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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

RADIO CORPORATION OF AMERICA,
Petitioner,

vs.

Hon. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

RADIO CORPORATION OF AMERICA,
Plaintiff-Counter-Defendant,

vs.

THE RAULAND CORPORATION and ZENITH RADIO CORPORATION,
Defendants-Counter-Claimants,

ZENITH RADIO CORPORATION and THE RAULAND CORPORATION,
Cross-Claimants,

vs.

RADIO CORPORATION OF AMERICA, GENERAL ELECTRIC COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Cross-Defendants.

PETITION FOR A WRIT OF CERTIORARI
No. 592

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT
Misc. No. 478

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February 12, 1955

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MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT

Misc. No.

Radio Corporation of America (RCA), petitioner herein, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered on November 15, 1954, or in the alternative that this Court grant petitioner's motion for leave to file a petition for a writ of mandamus or other appropriate writ directed to the Honorable Michael L. Igoe, United States District Judge for the Northern District of Illinois, Eastern Division.

Opinions Below

The opinion of the Court of Appeals is reported at 217 F. 2d 218. The District Court delivered two rulings and handed down one opinion, dated June 26, 1953, February 11, 1954, and June 11, 1954, respectively. The two rulings are unreported; the opinion is reported at 16 F. R. D. 160. The foregoing rulings and opinions are set forth in chronological order in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on November 15, 1954. The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U. S. C. Section 1254(1).

The jurisdiction of this Court to issue a writ of mandamus or other appropriate writ to the District Court is invoked under 28 U. S. C. Section 1651(a).

Questions Presented

In 1951 the Judicial Conference of the United States reported that complex and protracted patent and anti-trust cases create "an acute major problem in the current administration of justice. * * * It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is to let the parties exhaust the cross fire of pleading, to conduct open-court pre-trial hearings, or to let counsel try the case as they please."*

The instant huge and protracted case is an eloquent example of this problem, sharply aggravated by the fact

* Report of the Judicial Conference, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F. R. D. 62, 64, 66 (1951).

that two Federal District Courts in different parts of the country are now proceeding at cross purposes to deal with a large, complicated controversy, common to both litigations, and between the same interests. Disorder, duplication and contradictory handling of the same subject matter in two District Courts are highly prejudicial to the petitioner, and also manifestly inconsistent with the recommendations of the Judicial Conference and the prompt, efficient and economical administration of justice.

The questions presented are:

1. Whether a Federal District Court may, consistent with the rules of comity and the orderly administration of justice, proceed with a controversy in disregard of active proceedings and prior rulings in another District Court which first acquired jurisdiction, and accord contrary judicial treatment to the controversy.

2. Whether the Court of Appeals should not exercise its power under Section 1651(a) of Title 28 of the United States Code to issue a writ of mandamus or other appropriate writ to the District Court, requiring it to continue its prior stay of the second action.

Statement

This case involves a conflict between two litigations pending in two different courts, the first in the United States District Court for the District of Delaware, and the second in the United States District Court for the Northern District of Illinois, Eastern Division.

The principal parties are Zenith Radio Corporation (Zenith), a manufacturer of radio and television receiving sets, and RCA. The subject matter of their controversy relates to RCA's patent licensing activities.

For many years RCA has been licensing radio manufacturers, including Zenith, under its patents and those of the General Electric Company (GE), Western Electric Company, Inc. (WE), and others, pursuant to various agreements approved by a Consent Decree of November 21, 1932, entered in the United States District Court for the District of Delaware.

On December 13, 1946 Zenith repudiated its license agreement with RCA and instituted the first of three declaratory judgment actions against RCA, GE, WE, and others, in the Delaware District Court.

These actions seek a judgment of invalidity and non-infringement of the patents licensed by RCA, a judgment that all the patents licensed by RCA are unenforceable because of the alleged illegality under the anti-trust laws of RCA's alleged monopoly of patents and its patent licensing policies and practices, and affirmative injunctive relief.*

Proceedings in the Delaware Action

The Delaware litigation has been directed by Chief Judge Leahy, a member of the Committee** appointed by the Judicial Conference in 1949 to make recommendations for the orderly and expeditious handling of large, protracted and expensive cases arising under the anti-trust and other laws. In conducting extensive pre-trial proceedings, Judge Leahy has carefully applied these recommendations which were approved and adopted by the Judicial Conference in 1951.

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* The three Delaware actions have been consolidated into one by stipulation and order of the Delaware Court of July 16, 1952.

** The Chairman of this Committee is Judge E. Barrett Prettyman. The other members of the Committee are: Judges Kimbrough Stone, Calvert Magruder, Augustus N. Hand, Walter C. Lindley, W. Calvin Chestnut, Frank L. Kloeb, Vincent L. Leibell, Leon R. Yankwich and Paul Leahy.

Pursuant to Federal Rule 42(b), the Delaware Court in 1952 ordered that the issues of validity and infringement of patents should be tried first and, thereafter, the legality of RCA's licensing practices under the anti-trust laws. Zenith vigorously opposed this order, and argued that the anti-trust issues should be tried first, stating:

> "We think that the anti-trust issue is the only issue that can dispose of the case." (Petitioner's Exhibit A, p. 15*)

After extensive argument and briefs, Judge Leahy set forth what he termed the "blueprint for the progress of this litigation."** In his opinion, Judge Leahy said:

> "This present complex litigation comes precisely within the authorization of FR 42(b). In fact, in infringement suits of lesser complexity antitrust or misuse issues have been separated for trial apart from patent issues." (Petitioner's Exhibit A, p. 28)

In addition, Judge Leahy took firm control over the scope of the anti-trust issues in conformity with the recommendations of the Judicial Conference, refusing to give the anti-trust issues the world-wide and archeological scope sought by Zenith.

Accordingly, Judge Leahy ruled that while the pre-trial discovery with respect to the anti-trust issues could and should proceed, neither the discovery nor the proofs were to be permitted to sprawl back to 1919, the date of the formation of RCA, or to go back into the agreements

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* Exhibit references are to the record of exhibits in the Court of Appeals, namely, petitioner's Exhibits (A-G) and Supplemental Exhibits (H-I), and respondent's Exhibits (A-H).

** Judge Leahy's opinions with respect to this blueprint are reported at 106 F. Supp. 561 (D. Del. 1952) and 109 F. Supp. 913 (D. Del. 1953). Judge Leahy's first opinion is printed as petitioner's Exhibit A.

and activities which had long since been superseded by the Consent Decree of 1932.*

In making these rulings in his comprehensive opinion of June 13, 1952, Judge Leahy stated:

> "The matter to be determined is of much vital interest to the parties, for the decision which is made now will direct the course of this large and complex litigation." (Petitioner's Exhibit A, p. 7)

Zenith filed voluminous papers in support of a petition for reconsideration of this "blueprint." The petition was denied with another opinion by Judge Leahy (109 F. Supp. 913), and Zenith then sought review by appeal and by petition for mandamus in the Court of Appeals for the Third Circuit.

Zenith argued that the effect of Judge Leahy's rulings was to deprive Zenith of its cause of action for an injunction under the anti-trust laws, despite the fact that Judge Leahy had unequivocally stated that he had done nothing of the kind but had "fixed the historical frame of reference as to evidentiary matters and the chronology of proof to sustain plaintiff's alleged causes of action." (109 F. Supp. 913)

On April 3, 1953 the Court of Appeals dismissed the appeal and denied the petition for mandamus. Significantly, Zenith did not seek review of the Court of Appeals' decision in the Supreme Court. Instead, Zenith turned to another court—the Federal District Court in Chicago—where Zenith has persistently attempted ever since to

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* Judge Leahy noted in his opinion of June 13, 1952 (Petitioner's Exhibit A) that Zenith sought to bring 50 agreements before the court, 45 of the 50 agreements being in existence before the Consent Decree was entered, and all 50 agreements being known at the time the Decrees were affirmed by Judge Maris sitting as a District Judge in 1942. 46 F. Supp. 654 (D. Del. 1942). This reaffirmance resulted from a motion brought by the Government to vacate the Consent Decree of 1932. The appeal by the Government to this Court from Judge Maris' decision was dismissed on the Government's own motion, 318 U. S. 796 (1943).

reverse Judge Leahy and the Court of Appeals for the Third Circuit.

Proceedings in the Illinois Action

On December 7, 1948, two years after the commencement of the Delaware action, RCA brought a patent suit in the Northern District of Illinois at Chicago against Zenith and its just-acquired and wholly-owned subsidiary, The Rauland Corporation (Rauland), a manufacturer of cathode-ray tubes used in television sets manufactured by Zenith, claiming infringement of certain RCA cathode-ray tube patents.* This suit was brought in Illinois because Rauland was not subject to the jurisdiction of the Delaware Court. Because the alleged infringement involved different patents from those involved in the Delaware actions, RCA successfully resisted Zenith's attempt in Delaware to enjoin the Illinois suit and merge it and Rauland into the Delaware case.

Thereafter, by answer and various counterclaims, Zenith and Rauland introduced into the Illinois action in identical language the identical issues concerning the legality of RCA's patent licensing policies and practices under the anti-trust laws that Zenith had first raised in the Delaware action.**

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* The particular apparatus and patents involved in the Delaware actions consist of the home receivers (AM, FM and TV) manufactured by Zenith since 1946 and the patents infringed thereby. The difference between the apparatus and patents involved in the Delaware and Illinois actions is of no significance in the instant proceeding, which relates solely to the anti-trust issues common to both actions.

** Zenith described the issues in the two actions to the Illinois Court in its memorandum of January 29, 1952, as follows:

> "The issues, except for the particular patents which RCA chooses to assert in the two actions are the same in both actions, Zenith having alleged in its answer and counterclaim in this case [the Illinois action] the same basic controversy which Zenith first tendered to the court in Delaware in its complaint and reply, * * *." (RCA Petition in Court of Appeals, p. 4)

Immediately after the Court of Appeals for the Third Circuit had dismissed its appeal, Zenith transferred its efforts to evade Judge Leahy's "blueprint" to Illinois. The first step was to apply to District Judge Igoe for leave to amend its pleadings in the Illinois action, stating that it wished to set forth more clearly a cause of action for an injunction under the anti-trust laws. Zenith represented to the District Court in Chicago that its amendment was merely to clarify and simplify the anti-trust issues and

> "does not change any factual allegations. It merely incorporates into one document some of the allegations and the answers which were incorporated by reference in the counterclaim." (Transcript of April 9, 1953, Petitioner's Supplemental Exhibit H, pp. 3, 4)

But once this amendment was filed in Chicago, Zenith sought to proceed with pre-trial discovery on the anti-trust issues in the Illinois action on the ground that the issues were somehow different from those in Delaware and that discovery should therefore be allowed without regard for Judge Leahy's prior determination as to the manner in which the controversy should be handled.

On June 26, 1953, having been fully informed of the status of the Delaware action, Judge Igoe stayed all proceedings in the Illinois action pending the determination of the prior-pending Delaware action. Judge Igoe found that the anti-trust claims in both actions involved such identity of issues and parties that to proceed with the Illinois action would constitute an "interference" with Judge Leahy's orders and "with the orderly manner in which he thinks this litigation should be tried." (Appendix, p. 2)

But Zenith still did not give up its efforts to circumvent the order of the Delaware Court. In January of 1954, seven years after Zenith had first placed the controversy before

the Delaware Court, Zenith and Rauland again asked leave to amend their pleadings in the Illinois action. This time they added a claim for treble damages, based upon the identical allegations of violations of the anti-trust laws previously pleaded in both actions. As before, counsel for Zenith represented to the Court, on February 10, 1954, that the amendment did not change any factual allegations:

> "Strictly speaking, the present motion is not a pleading of an omitted counterclaim, but is a proposed amendment of a counterclaim already on file, so that treble-damage relief can be procured *under allegations which have in substance already been pleaded as a basis for injunctive relief.*" (Petitioner's Supplemental Exhibit I, p. 219)*

On February 11, 1954 Judge Igoe allowed this amendment, but unequivocally reiterated his ruling that the Illinois action should remain stayed until the determination of the prior-pending Delaware action. (Appendix, pp. 5-7)

Nevertheless a few months later Zenith renewed its relentless effort to avoid Judge Leahy's "blueprint for the progress of this litigation", and filed a motion on April 5, 1954 for leave to proceed with pre-trial discovery in the Illinois action. This time, it succeeded in persuading the Judge to reverse his previous rulings and lift his stay. Judge Igoe's opinion of June 11, 1954 also had the effect of overruling matters which had previously been decided otherwise by Judge Leahy and by the Court of Appeals for the Third Circuit.**

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* Emphasis ours throughout.

** For example, both Judge Leahy and the Court of Appeals for the Third Circuit rejected Zenith's contention that it had been denied its anti-trust cause of action in Delaware by the blueprint of the Delaware Court. Yet Judge Igoe's opinion of June 11, 1954, contrary to his rulings of June 26, 1953 and February 11, 1954, now infers that Zenith has only a misuse defense in Delaware and that its only anti-trust cause of action is in the Illinois forum.

Therefore, on July 12, 1954, RCA petitioned the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U. S. C. Section 1651(a), for a writ of mandamus or other appropriate writ with respect to Judge Igoe's order lifting the stay of the Illinois action. RCA argued that principles of comity as between Federal District Courts, and the orderly administration of justice in the federal judicial system in accordance with the recommendations of the Judicial Conference, required that the Illinois proceeding be stayed while the Delaware case went forward in accordance with the blueprint there established. The Court of Appeals denied the petition of RCA, in an opinion which did not pass directly on these contentions.

Judge Igoe's reasons for lifting the stay and the reasons assigned by the Court of Appeals for leaving his action undisturbed are not identical, but the principal reasons of the two Courts can be summarized collectively as follows:

1. The 1954 amendment claiming money damages and the presence of Rauland in the Illinois case transform the Illinois and Delaware litigations into cases involving different issues and parties, justifying conflicting judicial direction of the two cases.
2. It was within the proper exercise of Judge Igoe's discretion to lift the stay and, right or wrong, the Court of Appeals should not interfere. "* * * we [the Court of Appeals] can find no authority for reviewing his action by interlocutory appeal in the guise of a writ of mandamus * * *."*

Subsequent Proceedings in Delaware

On January 4, 1955 there was a hearing before Judge Leahy for the purpose of setting a date for the commence-

* There were other minor reasons assigned, including: (a) RCA was trying to stay a case it had itself started; (b) Judge Leahy had denied Zenith's earlier motion to stay the Illinois case; (c) there was no prospect of an early trial of the anti-trust issues in Delaware and certain witnesses indispensable to Zenith were aging and dying.

ment of the trial of the patents in Delaware in accordance with Judge Leahy's pre-trial orders. The defendants proposed the date of April 4, 1955, but Zenith advised the Court that *no* trial date should be set. Conceding now the substantive identity of the anti-trust issues in the two Courts, counsel boldly disclosed Zenith's desire to take the case away from the Court of prior jurisdiction in these unmistakable terms:

> "To sum it all up, our contention is this: That *so far as the anti-trust issues are concerned* we have a forum now for all the parties who are really involved in all the war where it is located in Chicago. *I am certainly sure this Court is not going to feel badly about being relieved of that lengthy litigation.* While it has been made to appear a great deal more involved than it really is, I believe; nevertheless, it is litigation which would impose time burdens upon this Court. *Another court has assumed to carry it.*" (Transcript, January 4, 1955, p. 16)

Zenith's counsel added:

> "* * * as I view it if we prevail on our anti-trust issue certainly there will be no need of this patent litigation. That is *a waste of time and a waste of money* * * *." (*Ibid.* p. 17)

The culmination was February 1, 1955, when Zenith filed a motion in the Delaware Court to stay the Delaware case, arguing that no "useful purpose would be served" by trying the Delaware suit.

But this, as we have seen on pages 5 and 6 above, is precisely what Zenith argued in the Delaware District Court over three years ago and lost—and took to the Court of Appeals for the Third Circuit and lost again.

And now, on the eve of trial in Delaware, in the ninth year after Zenith asked the Delaware Court to try the patents, Zenith is back in Delaware and boldly asserting that it has done in Illinois what it could not do in Delaware —reversed Judge Leahy's blueprint.

Reasons for Granting a Writ

1. Departure from Accepted and Usual Course of Judicial Proceedings and Frustration of Recommendations of the Judicial Conference.

By proceeding with anti-trust litigation in Illinois which is in all material respects the same as the litigation which the Delaware Court has deferred for trial, the Illinois Court has in effect reversed the Delaware Court's judicial blueprint for the handling of this litigation, which the Court of Appeals for the Third Circuit refused to disturb. The Court of Appeals for the Seventh Circuit has found itself without authority to review the inconsistent ruling of the Illinois Court.

Review of this situation by this Court is essential, therefore, to preserve the rules of comity, to prevent duplicative litigation and to prevent complete frustration of the recommendations of the Judicial Conference for orderly judicial administration and to avoid grave prejudice to petitioner and great disorder in this large, complex litigation.

The reasons assigned by the courts below for allowing this judicial conflict are wholly insufficient and the situation here presented is of even greater significance to the orderly administration of justice than the refusal to stay a subsequent litigation which warranted review in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952), where the Court stated (p. 183):

"Inasmuch as a question of importance to the conduct of multiple litigation in the federal judicial system was involved, we granted certiorari."

(a) *The Delaware and Illinois District Courts have the same controversy before them and have established conflicting procedures.*

Eight years after the filing of Zenith's original declaratory judgment action in the Delaware Court, the litigation has become a tangled confusion of claims, counterclaims, petitions and motions filed in two separate Federal District Courts, involving five corporations and proceeding upon an inextricable mixture of patent and anti-trust allegations and theories. In 1952 the Delaware Court, where the litigation started, established a precise judicial "blueprint" for going ahead with the proceeding. The decision was that the "patent issues" should be tried first, and thereafter the "anti-trust issues" should be tried in accordance with the recommendations of the Judicial Conference. The Illinois Court, in the obvious interests of comity and broad considerations of sound judicial administration, ruled in 1953 that proceedings in the Illinois Court would be stayed pending the Delaware Court's action.

In 1954, however, long after this plan of procedure was fixed and the rule of comity applied, the Illinois Court has disrupted this plan and violated this rule. Merely by adding a count for damages to the previous prayer for injunctive relief under the anti-trust laws, Zenith has persuaded the Illinois Court that the cases are somehow different—an "anti-trust case" in Illinois and a "patent case" in Delaware. By this strange alchemy, the stay has been lifted and ponderous litigation must now go forward in Illinois of issues which are the same in all material respects

with those being litigated in Delaware in accordance with a judicial plan carefully worked out through years of controversy, which has already cost literally millions of dollars and enormous time and effort by Court and counsel.

Thus was the Delaware Court's decision in effect reversed, its blueprint for procedure set aside, the principles of comity between Federal Courts and order and economy in judicial administration defeated.

This process of ousting the Court first possessed of the case reached an ironic climax on January 4, 1955, when counsel for Zenith opposed RCA's latest effort to set a trial date and blandly suggested to the Delaware Court that it wouldn't mind "being relieved" of the trial of the antitrust issues by the Illinois Court, and that the proceedings contemplated by the Delaware Court were now "a waste of time and a waste of money"!

After persuading the Illinois Court to lift its stay because the cases were different, Zenith now seeks to persuade the Delaware Court to impose a stay because the cases are the same.

These allegations of "difference" are groundless. There has been no change here, except in the tactics of Zenith and Rauland. They told the Illinois Court when they petitioned to amend their counterclaim that the treble-damage claim was based on

> "* * * allegations which have in substance already been pleaded as a basis for injunctive relief." (Petitioner's Supplemental Exhibit I, p. 219)

That was true. It still is. They told that same Court, when they asked earlier to have the Zenith and Rauland claims joined in one pleading, that these claims presented a "common issue of fact." (*Ibid.* p. 227) That was true when this joinder was granted. It still is.

The mere addition of a dollar sign, a damage count, to old allegations seven years after the controversy had started does not change the legal and factual issues upon which the controversy depends. What is really involved in the anti-trust issues in both of these cases, the basic controversy on which any relief depends whether by damages or injunction, is the claimed illegality of RCA's patent licensing practices and the agreements resulting from the Consent Decree of 1932. In short, Zenith and Rauland must rely on a single basic anti-trust controversy, of which the Delaware Court first had jurisdiction and has reserved pending disposition of the patent questions.

The *claim* is that there are different issues here—at least when the argument is in Illinois. The *fact* is that Zenith is not satisfied with the way this case is being handled in the Delaware Court and has resorted to this long stratagem to get it into another forum. But there can be no tolerance for repeating anti-trust allegations "which have in substance already been pleaded" first in one form then in another, and then in still another, over a period of eight years, and now in one District Court and then another, as a means of removing a case, in effect, from one jurisdiction to another.

The claim of "different parties" has no more substance than the claim of "different issues." Aside from the fact that Rauland is a wholly-owned subsidiary of Zenith with interlocking officers and directors and consolidated financial statements, no point was made of Rauland's technically separate identity from 1948, when the Illinois case was started, until 1954. In 1949 Zenith told the Delaware Court:

> "With respect to Rauland the result should be the same even though it is a separate corporation not originally a party to the Delaware case. For, it is

> not only a wholly owned and controlled subsidiary of Zenith, but it is the supplier of the alleged infringing cathode-ray tubes to Zenith and, what is even more significant, Zenith has undertaken the entire defense of the Chicago suit not only on its own behalf but also in behalf of Rauland. The decree in that case will be binding on Zenith whether the suit proceeds in the name of both Zenith and Rauland or in the name of Rauland alone." (RCA Petition in Court of Appeals, p. 19n.)

Likewise, no point was made of the fact that Rauland was a party to the Illinois action and not to the Delaware action in June 1953 when the Illinois Court first stayed the Illinois action on the ground of identity of issues. The reason is clearly stated in the Zenith Memorandum of February 10, 1954 in the Illinois action, when Zenith was seeking permission to file the treble-damage amendment itself:

> "The same facts adduced on the Rauland counterclaim are relevant in the Zenith counterclaim, and the two claims are joined together under the rules of this Court recognizing that where a *common issue of fact* is concerned the two anti-trust claims are properly joined together. *See Kainz* vs. *Anheuser-Busch, Inc.*, 194 F. 2d 737." (Petitioner's Supplemental Exhibit I, p. 227)

Even if it were assumed that Rauland has an anti-trust argument separate from Zenith's, that is not presently in issue. Rauland will be entitled to take up any claim it has in any court it chooses. The only question now is that of orderliness and timeliness. Stated differently, the question is whether Rauland's anti-trust allegations, which will rise or fall precisely with Zenith's, properly require or warrant being taken up in a court and at a time which results in the complete disruption of the blueprint previ-

ously established for this whole litigation by the Delaware Court and accepted and endorsed by the Illinois Court. No such overriding interest in Rauland has been shown or even seriously alleged.*

The Federal Courts are charged, in situations of this kind, to look beyond mechanistic criteria to the more basic factors involved. In *Landis* v. *North American Co.*, 299 U. S. 248 (1936), at 254, this Court stated:

> "* * * we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. * * * the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

To attempt to divert attention from the inescapable and overriding identity of the basic issues in this for-

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* Other reasons assigned in the opinions below for the action of the Illinois Court must have been due to misunderstanding. The Court of Appeals refers to the fact that RCA is seeking to stay proceedings it started as a "relevant factor." But, of course, RCA started a case for infringement of patents which are not involved in the patent case in Delaware, and the action it is seeking to stay is an anti-trust case resting on precisely the same facts as in Delaware.

Again, the Court of Appeals seemed to attach some significance to the fact that Judge Leahy had denied Zenith's earlier motion to stay the Illinois case. But this was an effort on Zenith's part to stay the patent suit in Illinois, and the Delaware Court rejected it because the Illinois infringement case involved different patents—cathode-ray tube patents and not the home receiver set patents involved in Delaware.

The insincerity of Zenith's complaints that they were being prejudiced by lapse of time and the advanced age of "indispensable" witnesses is reflected in Zenith's attempts to delay the trial of the Delaware case, and the time it has spent in its efforts to remove the anti-trust case from the jurisdiction of the Delaware Court. Moreover, in spite of Judge Leahy's clear authorization and RCA's repeated invitation, Zenith has taken no steps toward pre-trial discovery in Delaware on the anti-trust issues.

midable litigation by a pretense of differences in interests or in forms of anti-trust remedies, is to garb nonsense in the emperor's cloth of technicality. The considerations fundamental to comity and orderly judicial procedure are exactly the same today as they were before the treble-damage amendment was added to the Zenith and Rauland counterclaim.

(b) *Frustration of Work of the Judicial Conference.*

The Illinois District Court and the Court of Appeals for the Seventh Circuit seem to have been distracted by little technicalities from pursuing the orderly procedure so essential in the "Big Case." One litigation as large and complex as this is enough, without multiplying by two the problems and the burdens on litigants, courts, counsel, and the taxpayer.

The Judicial Conference Committee on Procedure in Anti-Trust and Other Protracted Cases emphasized the vices inherent in the "Big Case" in its 1951 Report:

> "Unnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money are among the vices resulting from the circumstances described, but the principal vice is that such conditions create confusion, magnify uncertainty, multiply the possibilities of error, and otherwise tend to make less certain and less accurate the judicial determination of disputed issues. The latter vices, if permitted to continue to exist, might threaten the judicial process itself in respect to complex controversies."*

The Report further stated that "the efficient conduct of one of these cases depends in large part upon a skillful and complete pre-trial organization of the proposed

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* 13 F. R. D. 62, 64 (1951).

evidence, the expected witnesses, and the trial personnel.'"* The Report also recommended the separation of issues where possible, so as to permit "the judge to concentrate his attention upon one issue at a time and greatly (assist) him in evaluating and weighing the opposing evidence upon each point. (This) is undoubtedly the most efficient way in which to proceed, where the case is of a nature to permit it."**

Being a member of the Judicial Conference Committee, Judge Leahy is intimately familiar with the Committee's work and recommendations, and faithfully followed these recommendations throughout the extensive pre-trial proceedings in Delaware. The Court of Appeals for the Third Circuit upheld Judge Leahy's rulings. But the District Court in Illinois and the Court of Appeals for the Seventh Circuit did not even advert in their rulings to the work of the Judicial Conference Committee and its recommendations. As a result, nearly all the vices anticipated by the Judicial Conference are now being fully realized in these litigations.

Indeed, discovery in the anti-trust issues is proceeding in Illinois before preliminary motions have been decided and without any pre-trial conference to settle the scope of the inquiry.*** Nor are mere pre-trial depositions all that

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* 13 F. R. D. 62, 65 (1951). "The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed." (p. 66)

** 13 F. R. D. 62, 73 (1951).

*** On November 30, 1954 RCA filed with the Clerk of this Court an application for a stay of all proceedings in the Illinois action pending the final determination by this Court of a petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit, or of an alternative petition for a writ of mandamus or other appropriate writ. This application was denied by Mr. Justice Minton on December 2, 1954.

is involved. As the Judicial Conference recognizes, the entire course of a litigation of this magnitude is shaped at pre-trial. What is happening here is that the Illinois action is taking a course entirely contrary to the rulings of the Delaware Court and the recommendations of the Judicial Conference.

These recommendations are designed not only to afford the parties an orderly and equitable proceeding in the conduct of the "Big Case," but also to enable the judicial system to cope with their size and complexity. The fundamental principle advocated and unanimously endorsed is that one judge be assigned to the entire case. Such an assignment has been described as "a prerequisite to the accomplishment of each of the principal recommendations of the Judicial Conference Report."* The wisdom and value of this recommendation is succinctly endorsed by the Attorney General in his 1952 report to the Judical Conference, in the following language:

> "* * * experience has shown that it is of greatest advantage to litigants and the least burden to the judiciary if the cases are assigned for all purposes to a single judge. * * * The Department of Justice recommends earnestly the extension of this practice * * * to the maximum practicable extent."**

Obviously the purpose is to avoid conflict as well as waste and inefficiency. The Judicial Conference and others contemplate that such cases be tried in a single district, and that litigation handled by more than one judge would result in a wasteful and inequitable course. *A fortiori*, these vices are multiplied where the same issues are

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* Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases of the Section of Antitrust Law of the American Bar Association, May 1, 1954, p. 5.

** Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, 1952, p. 32.

following two inconsistent courses in two different districts and two different circuits concurrently.*

The burden to the judicial system created by the gargantuan proportions of cases such as these is an increasing one. For example, there were twice as many private anti-trust actions filed in the Federal District Courts in 1954 as in 1948, and more than 1,100 private anti-trust cases have been filed in the last six years.**

All this occurs at a time when both the bench and bar are justifiably concerned about delays in the administration of justice.

Chief Justice Hughes, an active leader in organizing the Federal Courts for the efficient administration of justice, spoke in 1940 of the "rich promise" of the Judicial Conference and the Administrative Office of the United States Courts.***

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* The fact that this is so in these litigations is illustrated by the following:

1. The Judicial Conference recommends pre-trial conferences. 13 F. R. D. 62, 67-73 (1951). Extensive pre-trial hearings were held in Delaware. None were held in Illinois.
2. The Judicial Conference recommends that trial judges limit the period of inquiry to that "reasonably relevant to present possibilities of effective judgment" and that consideration of this feature be a function of conferences prior to trial. 13 F. R. D. 62, 73-74 (1951). Such limitation was considered in the pre-trial hearings in Delaware and the period of inquiry was carefully delineated. In Illinois no limitations at all have been established.
3. The Judicial Conference states that "interparty discovery proceedings, under the Rules of Procedure, not arranged for in the judge's pre-trial program, are not helpful in the elimination of unnecessary delay, expense, or volume of record." 13 F. R. D. 62, 83 (1951). Discovery in Delaware has been held within such a program. There is no such circumscription of discovery in Illinois.

** Annual Report of the Director of the Administrative Office of the United States Courts, September 1954, pp. A-18-A-19.

*** Address of Chief Justice Hughes to the American Law Institute on May 16, 1940; Proceedings of the American Law Institute, Vol. XVII, p. 27, at 31.

Certainly this case not only merits review by this Court in the exercise of its responsibility for the supervision of the federal judicial system, but its present disorderly condition presents a sharp conflict with the significant work of the Judicial Conference, and, in the words of Chief Justice Hughes, its "rich promise".

2. Conflict Between Court of Appeals for the Seventh Circuit and Other Circuits on Concurrent Prosecution of Same Controversy In Two Different District Courts.

The Third Circuit has consistently held that the district court first obtaining jurisdiction of a controversy must proceed to determine it, and that the rules of comity forbid the prosecution of subsequent litigation involving substantially the same issues pending determination of the first action. *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925 (3d Cir. 1941), *cert. denied*, 315 U. S. 813 (1942), *rehearing denied*, 315 U. S. 831 (1942); *Crosley Corp.* v. *Westinghouse Electric & Mfg. Co.*, 130 F. 2d 474 (3d Cir. 1942), *cert. denied*, 317 U. S. 681 (1942); *Triangle Conduit & Cable Co.* v. *National Electric Products Corp.*, 125 F. 2d 1008 (3d Cir. 1942), *cert. denied*, 316 U. S. 676 (1942). Compare the decision of the Fourth Circuit in *International Nickel Co.* v. *Barry*, 204 F. 2d 583 (4th Cir. 1953) and the decision of this Court in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952).*

The Seventh Circuit has ruled in this case to the contrary, permitting the subsequent Illinois action to proceed.

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* It is not clear from the opinion of the Seventh Circuit what standard for the sufficiency of the identity of issues and parties it thought applicable. While it adverts to the standard prescribed by this Court in *Landis* v. *North American Co.*, 299 U. S. 248 (1936), the Court was there concerned with actions involving completely different and independent companies and not the identity of interests between a parent and a wholly-owned subsidiary purchased after the primary litigation had commenced. This Court imposed a stay in the *Landis* case.

3. Conflict between Court of Appeals for the Seventh Circuit and the Supreme Court and Conflict Between the Circuits on Propriety of Mandamus.

The opinion of the Court of Appeals for the Seventh Circuit misconstrues and misapplies this Court's recent decision in *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379 (1953), and is also in apparent conflict with the decisions of other circuits on the propriety of mandamus to review stay orders and orders involving similar considerations.

In *Bankers Life,* this Court reaffirmed the familiar teaching that mandamus and other extraordinary writs are "meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' * * *." 346 U. S. at 383. The present case presents precisely the type of exceptional circumstance which calls for the use of an exceptional remedy. The Illinois Court has mistakenly usurped the judicial power of the Delaware Court and contradicted the discretion already exercised by the District Judge in Delaware. The Seventh Circuit concluded that Judge Igoe's decision to lift his stay and treat the treble damage claim as a new and different case should not be disturbed because the District Judge was merely exercising his discretion.

To be sure, trial judges must have the utmost latitude in the exercise of their discretion and abuse of such discretion should be hard to find on appeal. But the instant situation is one in which two judges have exercised their discretion over the same subject matter, and their discretion is in conflict.

So what we have on the matter of judicial discretion is that by not interfering with Judge Igoe's exercise of discretion the Court of Appeals in Chicago did in fact interfere with Judge Leahy's prior exercise of his discretion.

Nevertheless, the Court of Appeals for the Seventh Circuit, relying on *Bankers Life,* held that "The order having resulted from an exercise of his [the District Judge's] discretion, where he undoubtedly had the power, *we can find no authority* for reviewing his action by interlocutory appeal in the guise of a writ of mandamus or other extraordinary remedy." (Appendix, p. 19)

This interpretation misconceives the holding of *Bankers Life. Bankers Life* did not limit the authority of the Court of Appeals in a situation where the product of eight years of protracted litigation in one District Court had been disregarded and discarded by another District Court.

Bankers Life was expressly confined, furthermore, to circumstances where both District Courts were "within the realm of the same court of appeals which has denied the writ" and where it was "not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated." 346 U. S. at 384. Here, there is a conflict between two District Courts in two different circuits in violation of the principles of comity and the recommendations of the Judicial Conference—and not subject to effective review in *one* Court of Appeals.

Three Justices of this Court carefully pointed out in their dissenting opinion in *Bankers Life* that the holding of the majority "necessarily leaves open the question whether such a ruling by a district judge may be reviewed by mandamus, without awaiting the completion of the entire litigation, in circumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience." 346 U. S. at 388.

The opinion of the Seventh Circuit in denying mandamus is also in apparent conflict with the decisions of

other circuits on the propriety of mandamus to review stay orders,* *P. Beiersdorf & Co.* v. *McGohey*, 187 F. 2d 14 (2d Cir. 1951); *Mottolese* v. *Kaufman*, 176 F. 2d 301 (2d Cir. 1949); *In re President and Fellows of Harvard College*, 149 F. 2d 69 (1st Cir. 1945); *International Nickel Co., Inc.* v. *Martin J. Barry, Inc.*, 204 F. 2d 583, 585 (4th Cir. 1953); and orders involving similar considerations. *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied*, 340 U. S. 851 (1950); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950); *Wiren* v. *Lawes*, 194 F. 2d 873 (D. C. Cir. 1951); *cf. U. S.* v. *District Court for the Eastern District of Tennessee*, 209 F. 2d 575 (6th Cir. 1954).

This Court has recurrently affirmed the propriety of an extraordinary writ to assure the proper administration of justice in the federal judicial system. See *McClellan* v. *Carland*, 217 U. S. 268 (1910); *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *U. S. Alkali Export Association* v. *United States*, 325 U. S. 196 (1945); *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25-31 (1943).

Conclusion

At stake in this case is the question whether the high purposes announced by the Judicial Conference and implemented by the Delaware District Court are to be frustrated. The writ of mandamus, sought of the Court of Appeals for the Seventh Circuit, represented the only method by which that Court could have prevented such frustration.

Petitioner respectfully submits that this case presents important questions relating to the orderly administra-

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* The propriety of a writ of mandamus in situations involving stay orders is established in this Court by *McClellan* v. *Carland*, 217 U. S. 268 (1910).

tion of justice in the Federal Courts never before reviewed by this Court.

To restore the order once established in this large litigation, petitioner therefore turns to this Court to exercise its responsibility for the supervison of the federal judicial system and prays that a writ of certiorari should be granted, or in the alternative that a writ of mandamus or other appropriate writ should be issued directing the reinstatement of the stay of the Illinois action pending final determination of the Delaware action.

Respectfully submitted,

ADLAI E. STEVENSON
JOHN T. CAHILL
Counsel for Petitioner
Radio Corporation of America.

February 12, 1955.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

RADIO CORPORATION OF AMERICA, Petitioner, *vs.* HON. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division, Respondent.	Misc. No.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR OTHER APPROPRIATE WRIT TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Petitioner herein today filed with this Honorable Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit under 28 U. S. C. Section 1254(1), to review an order of said Court of Appeals denying a petition for writ of mandamus or other appropriate writ to the United States District Court for the Northern District of Illinois.

In the event said Petition for Certiorari is denied as an inappropriate method of reviewing the action of either or both Courts below, petitioner hereby files this motion for leave to file with this Honorable Court the said petition as a Petition for Writ of Mandamus or Other Appropriate Writ to the District Court of the United States for the Northern District of Illinois.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code. The following decisions sustain the power and jurisdiction of this Court to review the order of the District Court:

McClellan v. *Carland*, 217 U. S. 268 (1910);
McCullough v. *Cosgrave*, 309 U. S. 634 (1940);
United States Alkali Export Association, Inc. v. *United States*, 325 U. S. 196 (1945).

Respectfully submitted,

ADLAI E. STEVENSON
JOHN T. CAHILL
Counsel for Petitioner
Radio Corporation of America.

February 12, 1955.

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

RADIO CORPORATION OF AMERICA,
Petitioner,

vs.

Hon. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
No. 592

RADIO CORPORATION OF AMERICA,
Plaintiff-Counter-Defendant,

vs.

THE RAULAND CORPORATION and ZENITH RADIO CORPORATION,
Defendants-Counter-Claimants,

ZENITH RADIO CORPORATION and THE RAULAND CORPORATION,
Cross-Claimants,

vs.

RADIO CORPORATION OF AMERICA, GENERAL ELECTRIC COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Cross-Defendants.

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT
Misc. No. 478

APPENDIX

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS.
EASTERN DIVISION

RADIO CORPORATION OF AMERICA,
Plaintiff,

vs.

THE RAULAND CORPORATION and
ZENITH RADIO CORPORATION,
Defendants.

Civil Action
No. 48 C 1818

RULING OF THE COURT ON JUNE 26, 1953

THE COURT: Well, as I see this situation, you have two law suits here, one in Delaware and one in Illinois, and insofar as I can understand it, they are both identical; the same issues are raised and the same parties are involved, except up here you do not have all of the parties you have down in Delaware.

That case down in Delaware has been pending for about six or seven years. According to these papers, Judge Leahy has given a lot of his attention to this matter and apparently he has gone into the matter rather thoroughly.

He has indicated the manner in which he is going to try that law suit there, and the issues in that law suit, I believe, are the same issues out here.

I do not see any good reason why I should sit in review over what Judge Leahy is doing. I do not know why I should interfere with the manner in which he tries that case. I thought a long time ago and I am still thinking so on the suggestion that this entire matter should be transferred down to Judge Leahy, let him have both cases, and

there wouldn't be any question about the differences of opinions as to the judges who might sit in the case.

In this case in Delaware Judge Leahy has gone into this matter very thoroughly and he has indicated he wants to try it and has set forth his schedule.

Now, you have had permission to file your counterclaim and it has been answered. You want to proceed in taking your depositions in support of the allegations. Judge Leahy doesn't think that should be until the other issues have been passed upon.

And very frankly, without saying any more about it, I believe I agree with Judge Leahy and I am not going to do anything that will interfere with the orderly manner in which he thinks this litigation should be tried.

Now, if you folks think the decision should be otherwise, and no doubt you do, my only answer to that is this, that I am quite willing to transfer this whole proceeding down to Judge Leahy under the provisions in the statutes.

Otherwise, we will let this counterclaim stand with the answer remaining here until that case down there has been concluded.

MR. WRIGHT [Counsel for Zenith and Rauland]: Your Honor, may I say this, sir.

We have had no opportunity—we didn't know we were going to be met with this issue of transfer this morning. We have had no opportunity to file any brief with your Honor on the question of stay or transfer. Now, before your Honor enters your order, may we have an opportunity to file such a brief?

THE COURT: A brief on what?

MR. WRIGHT: To point out the differences in the litigations, and why we believe this should not be stayed.

THE COURT: How long of a time do you want in which to file it?

MR. NIELDS [Counsel for RCA]: Your Honor, he already said this has been argued four times out here and now they want to file a brief?

MR. WRIGHT: As to those matters have already been decided.

THE COURT: What matters?

MR. WRIGHT: This matter.

THE COURT: About the stay?

MR. WRIGHT: Yes, sir.

THE COURT: When was it decided?

MR. WRIGHT: We understood it was decided, the matter of the stay would be continued generally; decided at the April 29th meeting, and in the meantime, we would be permitted to go ahead with these depositions.

THE COURT: You said I made that statement? I don't recall having made it. As far as my remembrance of what happened here that day was to this effect. There was to be a hearing had because you objected to the interrogatories, and I understood we were going to have a rather lengthy hearing here that day.

The lawyers were here from the different parts of the country. You withdrew your interrogatories, and then you wanted leave to file a counterclaim.

We granted you permission to withdraw the interrogatories, and although your opponents had no notice of your filing a counterclaim, you were granted leave to file it and they were given time in which to answer.

MR. WRIGHT: That is right.

THE COURT: Then, as I remember it, I said that if you were going to attempt to have discoveries under your counterclaim, if someone wanted to come in and ask for a stay on that proceeding, we would set it down for hearing.

MR. NIELDS: That is correct, and that is why we are here today.

THE COURT: That is exactly what has happened here. You have served notice to take these depositions and they have come in and asked for a stay.

MR. NIELDS: They filed a memorandum against our motion to stay.

MR. WRIGHT: We misunderstood your Honor.

THE COURT: I may be wrong in some statements but——

MR. WRIGHT: No, your recollection is correct, sir.

THE COURT: It is all right to file these additional briefs, but I don't know just what you mean? You have your counterclaim on file here, and if this litigation down in Delaware goes like you anticipate it now is going, Judge Leahy is not going to give you the opportunity of having this branch of the case heard there. It is still alive out here.

No, I think we will let this whole thing stand that way. You won't need an order. You can make up your record the way it is. Isn't that right?

MR. NIELDS: That is right.

THE COURT: Unless you want to bring in some sort of an order?

MR. NIELDS: Could we leave it as it is, your Honor?

THE COURT: All right, we will conclude it this way, the depositions sought to be taken, the notice of which is filed, will be stayed until further order.

MR. NIELDS: Thank you, your Honor.

MR. WRIGHT: Thank you, sir." [Transcript, pages 50-56]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

RADIO CORPORATION OF AMERICA, Plaintiff, *vs.* THE RAULAND CORPORATION and ZENITH RADIO CORPORATION, Defendants.	Civil Action No. 48 C 1818

RULING OF THE COURT ON FEBRUARY 11, 1954

THE COURT: Well, that is all, Mr. Cummings [Counsel for WE].

There is one thing that there can't be [any] disagreement about in this matter and that is, before Mr. McConnell [Counsel for Zenith and Rauland] came into this law suit it was agreed that the proceedings in Delaware were to be terminated before any other proceedings out here are moved. I think that was definitely understood.

MR. NIELDS [Counsel for RCA]: That was how I understood your Honor's ruling.

The Court: Now, we come to this motion before us and I do not see this question as difficult as the attempt has been made to make it appear here to be. They already have on file a counter claim, and they are asking to amend the counter claim.

Under the Federal Rules of Civil Procedure, I think they are well within their rights and that motion will be allowed.

I don't know how long you want in which to answer that, whether you move to strike or whatever other papers you

want to file in opposition to it, but whatever it is that will be determined now if you will make a suggestion.

MR. NIELDS: Your Honor, we would like to have about twenty days with the understanding that we will put all of our defenses in our reply, and we will expect then the whole thing will be subject to stay until the Delaware proceeding finishes?

THE COURT: That is definitely understood. We will not have any action in this branch of the law suit in Chicago until the Delaware litigation has concluded. That was the agreement that was reached before you arrived here, Mr. McConnell, and we are going to keep it. But that does not mean an amended counter claim may not be filed. You may have whatever time you say you want, twenty days, in which to file whatever you want in answer to it.

MR. NIELDS: With the understanding that we will put everything in it but it will be subject to the stay.

MR. MCCONNELL: I don't want to agree to something being subject to stay which I don't know about. I am not sure about the foreseeable future. Any order of this kind, as your Honor knows, is subject to changed circumstances and I certainly do not want to agree here that I am bound by an agreement subject to things which may arise in the future with respect to this litigation.

THE COURT: Any time you would like to discuss the matter with respect to the litigation handled down in Delaware you can always come in here.

MR. MCCONNELL: That is what I mean. I think we should have the right to bring that to the Court's attention.

THE COURT: I think you are one of the very few lawyers in Chicago who has to be advised this Court is always open and you can come in here any time you want to.

MR. MCCONNELL: And that is what I always do.

THE COURT: Well, the door is still open.

MR. MCCONNELL: Twenty days is all right with me.

THE COURT: But I thought it was understood and I know that is the way I understood it, and that is the way

it is going to be, the Delaware branch of this litigation shall be concluded before this branch starts to move.

MR. MCCONNELL: That may be, but I don't want any such agreement.

THE COURT: I understand you don't, and if there is some reason they are not proceeding in Delaware down there, you can always come in and bring that to our attention.

MR. MCCONNELL: Well, I may come in.

THE COURT: Well, I hope not.

MR. CUMMINGS: It is your Honor's ruling we are made a party?

THE COURT: Yes, sir.

MR. CUMMINGS: We may have twenty days too?

THE COURT: Yes, sir. [Transcript, pages 58-62]

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

RADIO CORPORATION OF AMERICA, Plaintiff-Counter-Defendant, *vs.* THE RAULAND CORPORATION and ZENITH RADIO CORPORATION, Defendants-Counter-Claimants, ZENITH RADIO CORPORATION and THE RAULAND CORPORATION, Cross-Claimants, *vs.* RADIO CORPORATION OF AMERICA, GENERAL ELECTRIC COMPANY and WESTERN ELECTRIC COMPANY, INC., Cross-Defendants.	No. 48 C 1818

MEMORANDUM OF OPINION

This matter comes on to be heard on the motion of Zenith Radio Corporation and The Rauland Corporation, defendants and cross-claimants herein, to be permitted to proceed with discovery proceedings under the Federal Rules of Civil Procedure.

In prior proceedings before this Court occurring in April of 1953, Zenith Radio Corporation sought to take depositions in aid of certain anti-trust issues raised in its counterclaim, which sought injunctive relief under the provisions of Sec. 16 of the Clayton Act, 38 Stat. 737. At that time it appeared to the Court that similar equitable issues were pending before the United States District Court for the District of Delaware and that the trial thereof was imminent, and acting upon such understanding this

Court indicated to counsel for the parties that in the situation as it was then presented further action on the anti-trust issues then raised in the instant case should await the conclusion of the Delaware action. No formal order staying the instant suit was entered.

Subsequently on January 8, 1954, Zenith Radio Corporation and The Rauland Corporation sought leave to file an amendment to their counterclaims herein, in which they set up that because of alleged violations of the anti-trust laws cross-claimants were excluded from carrying on their respective businesses in Canada and other foreign markets and sought by such counter-claims to recover treble damages from Radio Corporation of America, General Electric Company and Western Electric Company, Inc., cross-defendants. A trial by jury of the issues thus raised was requested by cross-claimants.

On February 11, 1954, cross-claimants were permitted leave to file such additional counterclaims, and cross-defendants have all filed answers thereto.

The present motion followed and has been heard on briefs and oral argument.

This is one of the oldest cases on the docket of this Court. It was instituted by RCA as a patent infringement action against The Rauland Corporation and Zenith Radio Corporation in 1948. At that time there had been pending for two years in the Delaware Court an action brought by Zenith against RCA, General Electric Company and Western Electric Company, seeking a declaratory judgment under the patent laws that certain patents were being asserted against Zenith and that these patents are invalid, not infringed and unenforceable.

Counterclaims were filed by RCA, General Electric and Western Electric in Delaware, asking damages for infringement of a large number of patents. In reply to the counterclaims, Zenith asserted that these counterclaim patents are unenforceable by reason of misuse in violation of the anti-trust laws.

Until the last amended counterclaim was filed in the instant case, there was never asserted by Zenith or Rauland in either case any issue of the right to recover damages for violations of the anti-trust laws.

In support of their motion, cross-claimants filed an affidavit in which they asserted there was no issue pending in the Delaware Court concerned with a treble damage suit and that The Rauland Corporation was not a party to the Delaware action and that therefore the parties and issues in the two cases were not the same. This affidavit also set forth that further delay of discovery procedures in the instant case would result in substantial prejudice to the rights of cross-claimants in that testimony and documentary evidence would be lost to them by reason of the fact that many of the witnesses were men of advanced age and that their knowledge of the location and content of documentary evidence was indispensable to the preparation and trial of the issues. It further appears from such affidavit that the only issues to be tried in the Delaware Court within the foreseeable future are issues involving the validity of patents covering the construction and manufacture of radio and television receiving sets.

It was conceded in the brief for RCA that was filed in opposition to the motion for leave to file these counterclaims that the present counterclaims assert an action "for treble damages never before asserted throughout the course of either this action or the Delaware action."

I am inclined to agree with cross-claimants that there is no longer any point in staying proceedings in this case, and I base this conclusion on the fundamental ground that the issues and the parties are not the same in the two cases and that this case must ultimately be tried here regardless of the disposition of the Delaware case. Cross-claimants assert they have been damaged by exclusion from the Canadian radio and television market and that they have been damaged in other specific ways by a conspiracy to dominate and monopolize the radio and television business. It is true that

proof of these charges might constitute a defense to the patent infringement charges in the Delaware case, but there are considerable differences between an orthodox anti-trust case and a misuse defense in a patent case.

In the Delaware case Judge Leahy has stated:

> "A misuse is a specific defense to an infringement suit, or an action for royalties, and the considerations there involved are different from those in the orthodox anti-trust suit." (106 F. Supp. 561)

It further appears that Rauland is not a party to the Delaware case and therefore cannot be bound by anything that occurs in that action. RCA urges that since Zenith owns the capital stock of Rauland, the latter should not be regarded as a truly separate party. However, RCA sued them as distinct parties in the present action, and mere ownership by Zenith of Rauland's stock does not serve to destroy the separate corporate existence of Rauland and of its right to a day in Court. Regardless of the disposition of the Delaware case, Rauland's counterclaim must ultimately be tried here.

It now appears that two different cases are presented in two different Courts and that the parties are not the same. In this situation it is well established that a Federal Court should not stay proceedings in its own jurisdiction to await the determination of issues in another Federal jurisdiction unless it appears that the parties and the issues are the same. *Triangle Conduit & Cable Co., Inc.* v. *National Electric Products Corporation,* 138 F. 2d 46 (C. A. 3, 1943), cert. denied 320 U. S. 784; *Cresta Blanca Wine Co.* v. *Eastern Wine Corporation,* 143 F. 2d 1012 (C. A. 2, 1944); *Advance Transformer Co.* v. *Bromberg,* 106 F. Supp. 691; *Arkay Infants Wear, Inc.* v. *Kline's Inc.,* 98 F. Supp. 862, 863; *Yale & Towne Mfg. Co.* v. *Manning, Maxwell & Moore, Inc.,* 91 F. Supp. 106; *Bryant Electric Co.* v. *Industrial Electronics Corporation,* 60 F. Supp. 197.

The only exception to this rule is where some question of vast public importance is involved, and in such case, "the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted". *Landis* v. *North American Company,* 299 U. S. 248, 254 (1936).

Nothing in the nature of a public interest which would justify staying proceedings in the instant case is asserted here, and the case therefore falls within the general rule that where the parties and issues in the two cases are different, a stay of proceedings should be denied.

It is argued in the RCA brief that the Delaware Court is the court of primary jurisdiction because a consent decree was entered in the Delaware Court in the case of *United States* v. *Radio Corporation of America,* No. 793 in the Delaware Court. However, neither Zenith Radio Corporation nor The Rauland Corporation was a party to that proceeding and they are therefore not in any manner bound by any ruling of the Delaware Court in that case. *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434; *Brown* v. *Fletcher,* 210 U. S. 82; *Ingersoll* v. *Coram,* 211 U. S. 335.

RCA states that this motion is an effort to overrule pre-trial orders of Judge Leahy in the Delaware action so as to permit cross-claimants to obtain discovery beyond that permitted by the pre-trial order of January 30, 1953. The parties are not in agreement as to the scope of discovery permitted by that order.

However, I wish to make it plain that I am not passing on the propriety of the proceedings in Delaware, and in permitting cross-claimants to proceed here I am not indicating any disagreement with the rulings made by Judge Leahy in the Delaware court. The scope of discovery in any case must depend upon the particular issues involved in that case, and what is appropriate to one case may be entirely improper in another. Rauland and Zenith have

alleged that they have been damaged by an unlawful conspiracy which had its inception in 1919. It is well established that proof of conspiracy entitles the complaining party to prove the origin and purposes of the alleged conspiracy, and it must follow that discovery with regard thereto must be extensive enough to embrace the inception of the conspiracy complained of.

It therefore appearing that there is no showing made for staying the proceedings in the instant case which would justify staying the instant treble damage counterclaims to await the trial of patent issues in the Delaware Court, the motion of Zenith Radio Corporation and The Rauland Corporation must be granted.

A draft order in accord with this opinion may be presented on notice in accordance with the Rules.

MICHAEL L. IGOE
Judge

Dated: June 11, 1954.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

October Term, 1954. October Session, 1954.

RADIO CORPORATION OF AMERICA,
Petitioner,
vs.
HON. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

No. 11220.

GENERAL ELECTRIC COMPANY,
Petitioner,
vs.
HON. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

No. 11221.

PETITIONS FOR WRIT OF MANDAMUS OR OTHER RELIEF.

November 15, 1954.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Pursuant to leave of this court, Radio Corporation of America, sometimes herein referred to as "RCA," and General Electric Company, sometimes herein referred to as "General Electric," filed their respective petitions for a writ of mandamus or other

appropriate writ directed to Judge Igoe of the District Court. Respondent answered and asked that the petitions be denied.

This court ordered the above entitled causes consolidated for hearing.

The petitions pray for a writ of mandamus or other appropriate writ, directing Judge Igoe to vacate an order entered on June 15, 1954, and directing that case No. 48C1818, in that court, sometimes hereinafter referred to as the Chicago action, be stayed until the determination of a case known as Civil Action No. 1247 in the United States District Court for the District of Delaware, sometimes hereinafter referred to as the Delaware action, and for general relief.

While the parties hereto are not in accord as to the proper inferences to be drawn from the facts set forth in the petitions, nor as to the correctness of the conclusions therein stated, certain relevant facts appearing in the petitions and answers in this court are undisputed and are now set forth.

The Chicago action was instituted on December 7, 1948, by RCA as a patent infringement suit against The Rauland Corporation, sometimes herein referred to as "Rauland," and Zenith Radio Corporation, sometimes herein referred to as "Zenith." Zenith and Rauland filed an answer and counterclaims which were amended and supplemented, and filed an amended counterclaim on April 9, 1953. The latter asks for a declaratory judgment of invalidity and non-infringement of patent rights. It alleges that Rauland manufactures and sells cathode-ray tubes, which are used in receivers made and sold by Zenith, Rauland being a wholly owned subsidiary of Zenith. It also alleges that, contrary to the assertions of plaintiff, the use and sale of said tubes does not constitute infringement of United States letters patent, because said patents are invalid, void and unenforceable for the reason that they are a part of a pool of patents and patent rights which were acquired

by plaintiff and have been "asserted" by RCA both alone and with the aid of other companies, as part of a conspiracy to dominate and monopolize the entire electronics field.

The counterclaim prays for judgment accordingly, and specifically for a judgment that the patents which defendants thus acquired and used in violation of the anti-trust laws are not infringed and are invalid. It prays for an injunction, costs of action, and attorney's fees, as well as general relief.

On April 29, 1953, plaintiff moved the court to stay proceedings in the Chicago case until the issues common to the Delaware action and the Chicago litigation had been disposed of in Delaware.

The Delaware action was commenced when Zenith filed in the Delaware court on December 13, 1946, on February 6, 1948, and August 8, 1949, three complaints for declaratory judgment, which were there consolidated as Civil Action No. 1247, naming RCA, General Electric, Western Electric Co., Inc., American Telephone and Telegraph Co., Bell Telephone Laboratories, Inc., and Westinghouse Electric Corporation, as defendants. In these cases Zenith charges that certain patents being asserted against Zenith are invalid, not infringed and unenforceable, praying that a declaratory judgment to that effect be entered and that RCA be restrained from asserting any rights based upon said patents against Zenith or any customer or user of its radio apparatus or any supplier of parts therefor. Counterclaims were filed by RCA, General Electric and Western Electric Co., asking damages for infringement of a large number of patents. Replying to the counterclaims, Zenith asserts that the latter patents are unenforceable by reason of misuse in violation of the anti-trust laws.

On July 8, 1949, Judge Leahy of the District Court in Delaware entered an order (1) denying Zenith's motion to stay the Chicago action, (2) denying Rauland's motion to intervene in the Delaware action, and (3) granting RCA's

motion to stay Rauland's independent action against RCA[1] in the Delaware court.

On June 26, 1953, plaintiff restated its motion in the Chicago action, as follows: to stay the trial of the Chicago case until after all matters in the Delaware case had been disposed of. Defendants having evinced an intention to take depositions, respondent indicated that such depositions would be stayed until further order. No order was actually entered. No depositions have been taken.

On February 11, 1954, Zenith and Rauland filed an amendment to their counterclaim, in which they make detailed allegations as to damages said to have been sustained by them as a result of the conspiracy charged against the counter-defendants, and they ask for summons to issue against various cross-defendants named in the said amendment, and that damages be assessed, including treble damages, for violation of the anti-trust laws[2], as well as costs of suit and attorneys' fees as provided by statute.

On June 15, 1954, Judge Igoe sustained a motion by Zenith and Rauland to permit them forthwith to proceed with discovery and to take depositions under the Federal Rules of Civil Procedure.

This is the order now under attack in this proceeding.

An important distinction exists between the power of a court to stay proceedings pending before it and the propriety of using that power, which calls for a weighing of competing interests and the maintenance of an even balance. *Landis* v. *North American Co.*, 299 U. S. 248, at 254. The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. The power to order that proceedings be stayed to abide proceedings in

[1] The record before us does not reveal the subject matter of this action, except that it is denominated Civil Action No. 1181.

[2] Zenith's total damages are alleged to be in excess of $13,356,549 and Rauland's total damages are alleged to be in excess of $2,700,000.

another court, is not limited to situations where the parties to the two causes are the same and the issues identical. On the other hand, a determination of the propriety of using such a power in a given situation requires that the suppliant for such a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. Considerations, such as these, however, are counsels of moderation rather than limitations upon power. Benefit and hardship will be set off, one against the other, and upon an ascertainment of the balance the court will exercise a discretionary judgment in the exercise of its power. *Landis* v. *North American Co., supra.*

Respondent, in deciding whether he should exercise his power as district judge to stay proceedings pending before him, had the right and the duty of considering several relevant factors, to some of which we have already referred: (1) the Chicago action was commenced by RCA and General Electric, who are now petitioning this court for a writ commanding respondent to stay proceedings in that case; (2) petitioners made Rauland a party defendant to the Chicago action; (3) Rauland is not a party to the Delaware action; (4) while petitioners filed counterclaims in the Delaware action asking for judgment against Zenith, they did not join Rauland; (5) they resisted, with success, Rauland's attempt to intervene in the Delaware action; (6) while the Delaware action has been pending since 1946 and it was represented to respondent in 1953 that the trial thereof was imminent, a year later it was made to appear to respondent that the only issues to be tried in the Delaware action in the foreseeable future were issues involving the validity of patents and that the witnesses whose depositions Zenith and Rauland wished to take are men of advanced age whose knowledge of the location and content

of documentary evidence is indispensable to the preparation and trial of the amended counterclaim; (7) that the claim for treble damages asserted by Zenith and Rauland, in the counterclaim, as amended, has not been asserted by either of them in the Delaware action (Rauland not even being a party thereto); (8) Judge Leahy ordered that in the Delaware action a separate trial of the issues relating to validity and infringement of patents specified in the counterclaims of RCA, General Electric and Western Electric Co. is to be had prior to the trial of any other issues in the case; (9) that no date for said separate trial has been set and when set will involve at least a year of court days; (10) rule 26 of the Federal Rules of Civil Procedure provides that any party may take depositions after the commencement of an action without leave of court; (11) when Rauland moved to intervene in the Delaware action petitioners objected and the motion was denied; (12) RCA's motion to stay an independent civil action brought by Rauland in the Delaware court against RCA, was granted; (13) Zenith's motion to stay the Chicago action was denied by Judge Leahy.

The record shows affirmatively that respondent considered many of the circumstances above enumerated. There is no showing that he did not consider all of them. It appears that he exercised his judgment and even if he arrived at an erroneous conclusion, which we do not now decide, he was not guilty of an abuse of discretion. As we have seen, he undoubtedly had the power to stay or refuse to stay the proceedings before him. The order having resulted from an exercise of his discretion, where he undoubtedly had the power, we can find no authority for reviewing his action by interlocutory appeal in the guise of a writ of mandamus or other extraordinary remedy. As was said in *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379 at 382, where a writ of mandamus was sought to vacate a severance and transfer order entered by a District Court:

> "Its decision against petitioner, even if erroneous —which we do not pass upon—involved no abuse of judicial power, *Roche* v. *Evaporated Milk Assn., supra,* and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States,* 325 U. S. 212, 217 (1945). This is not such a case."

The court then pointed out that the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial. The court said at 383:

> "We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable."

For the reasons hereinbefore set forth, we hold that this court should not grant a writ of mandamus or any other extraordinary writ directing the District Court to vacate

the order of June 15, 1954, or directing it to stay proceedings. Therefore the petitions are denied.

FINNEGAN, C. J. I concur in the result with these additional views:

This attempted invocation of an extraordinary remedy, as a vehicle to obtain our review of a non-appealable order, brings a recurrent problem into sharp relief. When a petition or motion for leave to file a petition for writ of mandamus becomes perfunctory or ritualistic, then petitioners obtain delays in proceedings at the trial below; burden the trial judge, and hinder opposing parties.

From my experience, I think that the bulk of these requests seeking leave to file petitions for extraordinary relief ought to be disposed of at the threshold. Readily granting leave, and going forward to full oral arguments adds not one whit to the appealability of orders usually complained of. Where such petitions are well grounded, an extraordinary remedy proceeding is the tool of an advocate, but in an increasingly predominating number of cases it has become simply a handy delaying or harassing tactic. Indeed, in those rare instances where judicial discretion is actually abused, it ought to be apparent from, and manifested by the face of the initial petition. Cumulative briefing and oral arguments add nothing to conduct and dispositions already cast into permanent record made below.

Under its Rules 30 and 31 (346 U. S. 951, 979) the Supreme Court has described considerations governing issuance of, and procedure on applications for, extraordinary writs. Significant, is its requirement that petitions for the issuance of such writs "* * * shall be prefaced by a motion for leave to file such petitions * * *"

As long as Congress restricts review by courts of appeals to appealable orders, we must ward off attempts to circumvent its mandate. At the same time, we need to alertly guard all litigants against arbitrary and capricious use of judicial power. But oppressive tactics are as damaging to the

orderly administration of justice in a free society, whether emanating from judge, plaintiff or defendant.

The order which stimulated petitioners in this case, did not terminate the litigation, pending below, on its merits. From the welter of exhibits, filed in this court, it is clear that these petitioners earlier resisted, as defendants, Zenith's attempt to obtain a writ of mandamus for review of Judge Leahy's order. Defending, in the Third Circuit Court of Appeals against use of an extraordinary writ for review of that Judge's order, petitioners here, there contended it was "* * * not appealable or otherwise reviewable * * *," citing in support, *Roche* v. *Evaporated Milk Co.*, 319 U. S. 21 (1943).* In my opinion the petitioners' argument, as defendants in the Third Circuit, was standing refutation of that which they just sought before us. The same statutory channel for appealing from a final judgment in the Third Circuit, is also open in this Circuit after a final appealable order is entered in the pending lawsuit below.

That writs of mandamus may not be used as substitutes for unauthorized review is well settled. Implicit in our original jurisdiction, over this extraordinary remedy, is power to grant or reject petitions, or motions, for leave to file petitions for such writs. Without this prefatory step, parties can shift trial judges into the status of litigants [*Ex Parte Fahey*, 332 U. S. 258, 259 (1947)] any time a ruling is thought to be uncongenial. Permitting parties to force district judges to retain counsel or ask an attorney, in the case before them for representation, merely by filing a petition for mandamus (if a matter of right in this court) would go far toward diluting trial courts' judicial powers. District judges must not be fettered by this threat—rule sympathetically, else plead forthwith as a respondent. Litigation would soon be disrupted if we tolerated continuous, though abortive, attempts at piecemeal review. Each peti-

* Brief for Defendants-Appellees in Support of Motion to Docket and Dismiss, dated March 30, 1953; Supplemental Exhibits, 53, 71.

tion for *leave to file* a petition for this drastic remedy needs to be subjected to a careful sifting and testing process prior to causing the respondent judge to plead and defend. Certainly our power, to grant relief in appropriate cases, will not atrophy from disuse.

A true Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of
Appeals for the Seventh Circuit.

FILED
MAR 10 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

RADIO CORPORATION OF AMERICA,
Petitioner,

vs.

Hon. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

No. 592.

RADIO CORPORATION OF AMERICA,
Plaintiff-Counter-Defendant,

vs.

THE RAULAND CORPORATION and ZENITH RADIO CORPORATION,
Defendants-Counter-Claimants,

ZENITH RADIO CORPORATION and THE RAULAND CORPORATION,
Cross-Claimants,

vs.

RADIO CORPORATION OF AMERICA, GENERAL ELECTRIC COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Cross-Defendants.

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT

Misc. No. 478.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR FOR MANDAMUS.

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IN THE

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MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT

Misc. No. 478.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR FOR MANDAMUS.

STATEMENT.

MAY IT PLEASE THE COURT:

The hybrid petition of Radio Corporation of America (hereinafter referred to as RCA) for certiorari or for

leave to file a petition for mandamus does not, we submit, meet the requirements imposed by this Court for the issuance of either a writ of certiorari or an original writ of mandamus.

The Application for Leave to Seek Mandamus.

So far as the petition for leave to file an original suit in mandamus is concerned, the petition is fatally defective in that it asks for leave to file an application for a writ against Judge Michael L. Igoe,* the District Court Judge against whom RCA asked for the issuance of such a writ in the Court of Appeals for the Seventh Circuit. Even if there had been no adjudication in the Court of Appeals this Court would decline to issue the writ to review the exercise of judicial discretion in the District Court. Thus, in *Los Angeles Brush Mfg. Corp.* v. *Jones,* 272 U. S. 701, 706, this Court said:

> "The question of thus using the writ of mandamus would be a matter of discretion in this court, and it would decline to exercise its power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review."

Cf. *Ex parte United States,* 287 U. S. 241.

In the instant case Petitioner chose to apply to the Court of Appeals for mandamus and that issue was adjudicated against RCA by such Court of Appeals and its decision stands unreversed. See order and opinion of the Court of Appeals at pages 14-21 of Appendix. This Court has held that an order dismissing a petition for mandamus cannot be attacked collaterally (*Louis* v. *Brown Township,* 109

* The nominal respondent is Judge Igoe—the real parties in interest in whose behalf this brief is filed are Zenith Radio Corporation and The Rauland Corporation, defendants-counter-claimants in the District Court case.

U. S. 162; cf. *Supervisors, Rock Island County* v. *U. S.*, 71 U. S. 435; see also 62 A. L. R. 316).

So far as we are able to ascertain no one heretofore has had the temerity to urge that in the event this Court denied a review of the case by certiorari it should then treat the Court of Appeals decision as a nullity and issue a writ of mandamus to the District Court Judge direct.

Even assuming *arguendo* that this Court has the power to disregard the Court of Appeals decision and review the District Court's order by original proceedings in mandamus, this Court exercises such jurisdiction only under the All Writs Act, and since no large question of public import is involved an application for leave to file a petition for mandamus should be denied. See *Ex parte Fahey*, 332 U. S. 253.

This Court has held that mandamus will not be granted "to review a ruling or interlocutory order made in the progress of a cause; for as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the Act of Congress that final judgments only should be brought before this Court for re-examination;' would 'introduce the supervising power of this Court into a cause while depending in an inferior court, and prematurely to decide it'; would allow an appeal on writ of error upon the same question to be 'repeated to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence'." (*American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 379.)

The Petition for Certiorari.

In so far as the petition for certiorari is concerned, if petitioner had made a fair statement of the way the issues were decided the opinion of the United States Court of

Appeals would be an adequate and complete answer. *At no time has any party challenged the jurisdiction or power of Judge Igoe to stay or refuse to stay proceedings before him in the instant case.* The Court of Appeals' recitation of the factors involved which the respondent Judge had the right and duty to consider "in deciding whether he should exercise his power as District Judge to stay proceedings pending before him" under all applicable decisions determines whether or not the District Judge was "guilty of an abuse of discretion".

As the Court of Appeals says in its opinion:

> "The order having resulted from an exercise of his discretion, where he undoubtedly had the power, we can find no authority for reviewing his action by interlocutory appeal in the guise of a writ of mandamus or other extraordinary remedy."

In support of this decision the Court of Appeals cited the decision of this Court in *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, and quoted the following language at page 382 of that decision as follows:

> "Its decision against petitioner, even if erroneous —which we do not pass upon—involved no abuse of judicial power, *Roche* v. *Evaporated Milk Assn., supra,* and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse

of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States*, 325 U. S. 212, 217 (1945). This is not such a case."

The petition cites no decision of this Court or of any Court of Appeals conflicting with that of the Seventh Circuit Court, but attempts to conjure up a conflict of decisions in the exercise of discretion between Judge Leahy in the Delaware Court and Judge Igoe in the Illinois Court. While petitioner fails in this, even had the attempt succeeded it would not have brought the petition within the purview of Rule 19(b) of this Court, which contemplates that this Court shall exercise its discretion to review by certiorari only in the event of a conflict between the decisions of Courts of Appeals "on the same matter".

Under the aforesaid Rule 19, which is in substance a reenactment of the old Rule 38 of this Court, it is clear that a petition for certiorari is not to be used merely as a device for affording "the defeated party in the Circuit Court of Appeals another hearing." (See *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163.)

To put it another way, the issuance of the writ is properly invoked only to review "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." (*Layne & Bowler* v. *Western Well Works*, 261 U. S. 387, 392.) The issues raised in the present petition do not fall in either category. The questions presented and designated as 1 and 2 at page 3 of the petition do not fall within the purview of Rule 19 of the Rules of this Court.

The Court of Appeals' recitation of the facts (Appendix, pp. 18-19) is not challenged on the merits by the

petition, nor are the trial court's findings of fact as shown in its opinion (Appendix, pp. 10-11).

However, in the instant petition the "Statement", found at pages 3 to 12, argues that a conflict exists between "two litigations pending in two different courts"—one in Delaware and one in Illinois. Both the District Court in Illinois and the Court of Appeals for the Seventh Circuit have found that no such conflict exists. Thus, to even reach petitioner's contention this Court would first have to review seven hundred and forty-five pages of exhibits and reverse both the trial court and the court of review on questions of fact.

ARGUMENT.

I.

THE PETITION FOR CERTIORARI WHEN VIEWED AGAINST THE RECORD DISCLOSES THAT PETITIONER TENDERS NO QUESTION OF LAW BUT SEEKS REVIEW OF THE FACTS FOR PURPOSES OF DELAY.

To make even a semblance of a serious contention, petitioner has to make the extraordinary and utterly false assertion that there is a serious conflict between Judge Leahy and Judge Igoe in the handling of two litigations in their respective courts. The record belies petitioner's contention, and the uncontradicted statement in Judge Igoe's opinion proves petitioner's contention a falsity. Thus, the statement of the issues in that opinion sets forth:

> "This is one of the oldest cases on the docket of this Court. It was instituted by RCA as a patent infringement action against The Rauland Corporation and Zenith Radio Corporation in 1948. At that time there had been pending for two years in the Delaware Court an action brought by Zenith against RCA, General Electric Company and Western Electric Company, seeking a declaratory judgment under the patent laws that certain patents were being asserted against Zenith and that these patents are invalid, not infringed and unenforceable.
>
> "Counterclaims were filed by RCA, General Electric and Western Electric in Delaware, asking damages for infringement of a large number of patents. In reply to the counterclaims, Zenith asserted that these counterclaim patents are unenforceable by reason of misuse in violation of the anti-trust laws.
>
> "Until the last amended counterclaim was filed in the instant case, there was never asserted by Zenith

or Rauland in either case any issue of the right to recover damages for violations of the anti-trust laws.

"In support of their motion, cross-claimants filed an affidavit in which they asserted there was no issue pending in the Delaware Court concerned with a treble damage suit and that The Rauland Corporation was not a party to the Delaware action and that therefore the parties and issues in the two cases were not the same. This affidavit also set forth that further delay of discovery procedures in the instant case would result in substantial prejudice to the rights of cross-claimants in that testimony and documentary evidence would be lost to them by reason of the fact that many of the witnesses were men of advanced age and that their knowledge of the location and content of documentary evidence was indispensable to the preparation and trial of the issues. It further appears from such affidavit that the only issues to be tried in the Delaware Court within the foreseeable future are issues involving the validity of patents covering the construction and manufacture of radio and television receiving sets.

"It was conceded in the brief for RCA that was filed in opposition to the motion for leave to file these counterclaims that *the present counterclaims assert an action 'for treble damages never before asserted throughout the course of either this action or the Delaware action.'* " (Italics ours.)

There obviously can be no conflict between Judge Leahy and Judge Igoe in the instant case because in Illinois Judge Igoe has merely permitted discovery proceedings under the Federal Rules of Civil Procedure on treble damage claims in an anti-trust suit, while Judge Leahy has not even reached any anti-trust issue in Delaware and no treble damage claims are asserted in the Delaware Court.

Under Judge Leahy's pre-trial order, a patent suit involving some 23 patents and broken up into eight separate hearings, the estimated time of trial and disposition of

which will consume some two years, must be heard before any hearings will be entertained on any anti-trust issue (Printed Exhibits filed Aug. 12, 1954; Ex. E). When and if heard, the anti-trust issues in Delaware are confined to a misuse defense which Judge Leahy himself characterized as follows:

> "A misuse is a specific defense to an infringement suit, or an action for royalties, and the considerations there involved are different from those in the orthodox anti-trust suit." (106 F. Supp. 561, 576.)

At page 10 of the petition it is claimed that the recommendations of the Judicial Conference require that the Illinois proceedings be stayed while the Delaware case goes forward in accordance with the "blueprint" there established in order to avoid a conflict between Judge Igoe's rulings and Judge Leahy's "blueprint for the progress of this litigation."

Certainly Judge Leahy does not believe that anything occurring in Illinois threatens to deprive him of jurisdiction over the issues he has assumed to try under what RCA counsel characterize as his "carefully worked out blueprint". Significantly, at no time did petitioner acquaint Judge Leahy of the recent proceedings in the Chicago District Court or in the Court of Appeals. When it became apparent that petitioner had no intention of advising Judge Leahy of the status of the Chicago litigation counsel for Zenith took the initiative and so advised him at the call of the civil calendar of cases in Delaware on January 4, 1955. Upon being advised of the course of the Chicago proceedings Judge Leahy stated to counsel for Zenith in open court, "If you are right I will stay this litigation, but I can't decide things *in vacuo*." (Tr. Jan. 4, 1955, p. 30.)

Judge Leahy thereupon permitted Zenith to file a motion to continue the trial of the patent issues in Delaware

pending completion of discovery depositions under the anti-trust issues pending in Chicago. Such motion was filed February 1, 1955 and petitioner has not yet replied to it in the Delaware Court.

Certainly Judge Leahy's handling of this matter gives no indication that he considers Judge Igoe's rulings conflict in any manner with his own and he is in a far better position than is a reviewing court to determine whether such an alleged conflict actually exists.

That Judge Igoe did not see any conflict between the two Courts is shown by his statement in his opinion as follows:

> "RCA states that this motion is an effort to overrule pre-trial orders of Judge Leahy in the Delaware action so as to permit cross-claimants to obtain discovery beyond that permitted by the pre-trial order of January 30, 1953. The parties are not in agreement as to the scope of discovery permitted by that order.
>
> "However, I wish to make it plain that I am not passing on the propriety of the proceedings in Delaware, and in permitting cross-claimants to proceed here I am not indicating any disagreement with the rulings made by Judge Leahy in the Delaware court. The scope of discovery in any case must depend upon the particular issues involved in that case, and what is appropriate to one case may be entirely improper in another. Rauland and Zenith have alleged that they have been damaged by an unlawful conspiracy which had its inception in 1919. It is well established that proof of conspiracy entitles the complaining party to prove the origin and purposes of the alleged conspiracy, and it must follow that discovery with regard thereto must be extensive enough to embrace the inception of the conspiracy complained of."

Of course, the real purpose of the instant proceedings is to prevent respondents from obtaining discovery of facts

showing a vicious world-wide restraint of trade in the electronics industry which RCA counsel by one stratagem or another have managed to keep buried for years. By delaying and harassing tactics and by the mandamus proceedings in the Court of Appeals, RCA has already obtained approximately six months of delay in the taking of depositions.

The instant petition makes no showing whatever of any prejudice which can result to petitioner by permitting respondents to pursue remedies available to them under the Federal Rules of Civil Procedure. A clear inference, however, is left on the record that evidence which will tend to sustain respondents' contention might be obtained by such procedure, but this is hardly a circumstance which can be characterized as prejudicial to any of RCA's legal rights.

After discovery procedures were actually under way in New York, counsel for RCA refused to permit the witness David Sarnoff to answer relevant and pertinent questions. It was necessary, therefore, for counsel to return to Chicago and argue the matter out before Judge Igoe. After a full hearing, Judge Igoe had the following to say about such delaying tactics:

> "The Court: * * * the sequence of these events definitely shows what was going on here. After you had exhausted your attempt to delay these proceedings everywhere you could, and after they had been noticed for hearing in New York, then you sent an additional lawyer in here to make this sort of motion [for pretrial conference]. That is the first time that request was ever made around here.
>
> "Mr. Cahill: That is true, your Honor, the first time it was up for pretrial conference. The first time that was made on this counterclaim. We did have an earlier conference, as I recall, when this case was on the equity side of the Court some years ago, but

this counterclaim was filed, as your Honor knows, this year and this is the first pretrial conference that has been asked in respect to it.

"The Court: And it was only asked after you had exhausted every movement you could engage in in order to prevent this discovery. Then you send an additional lawyer in here and say, 'Now, let us sit down and have a conference here.' " (Tr. Dec. 14, 1954, pp. 67-68).

In the Court of Appeals Judge Finnegan recognized that the mandamus proceedings instituted by RCA were designed to keep its officials from testifying at deposition hearings. In his concurring opinion Judge Finnegan said:

"Where such petitions are well grounded, an extraordinary remedy proceeding is the tool of an advocate, but in an increasingly predominating number of cases it has become simply a handy delaying or harassing tactic. Indeed, in those rare instances where judicial discretion is actually abused, it ought to be apparent from, and manifested by the face of the initial petition. Cumulative briefing and oral arguments add nothing to conduct and dispositions already cast into permanent record made below."

In the instant case, the grant of the writ of certiorari would inevitably result in further delay and would enable RCA to place one more legal hurdle in the way of respondents' attempt to discover the pertinent and relevant facts upon which their legal rights depend. To permit such an effort to succeed certainly furthers no public interest and merely makes an anti-trust litigation, which is obviously designed to advance the public interest, more expensive, more difficult and more ineffective in its designed purpose of preventing and destroying monopolies of the kind presented here.

II.

NO REASON WITHIN THE PURVIEW OF RULE 19 IS ADVANCED BY PETITIONER FOR THE GRANTING OF A WRIT OF CERTIORARI.

A. There Has Been No Departure From Accepted and Usual Judicial Proceedings.

Petitioner cites the case of *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952) as a reason for granting certiorari. There this Court said at page 184:

> "The conclusion which we are asked to upset derives from an extended and careful study of the circumstances of this litigation. Such an estimate has led the Court of Appeals twice to conclude that all interests will be best served by prosecution of the single suit in Illinois. Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours."

In the instant case this Court is being asked to review an exercise of judicial discretion by three judges of a Court of Appeals and one District Court Judge, each of whom has made "an extended and careful study of the circumstances of this litigation."

As stated by this Court in the *Kerotest* case (at pages 183-184):

> "Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts."

Certainly a refusal by the Court of Appeals to substitute its judgment on a discretionary matter for that of the trial court constitutes no departure from "accepted and usual judicial proceedings".

As stated in the concurring opinion of Judge Finnegan:

> "That writs of mandamus may not be used as substitutes for unauthorized review is well settled. Implicit in our original jurisdiction, over this extraordinary remedy, is power to grant or reject petitions, or motions, for leave to file petitions for such writs. Without this prefatory step, parties can shift trial judges into the status of litigants * * * any time a ruling is thought to be uncongenial. * * * District judges must not be fettered by this threat—rule sympathetically, else plead forthwith as a respondent."

These considerations are, we submit, most pertinent in the determination of whether or not a writ of certiorari shall issue here.

In its citation of authority, it is highly significant that petitioner has failed to mention a decision of this Court precisely in point on the question of whether mandamus will lie to review an order of a District Court refusing to stay proceedings in its own court because of the pendency of litigation in another District Court. That case is *In re Matter of Wagner,* 249 U. S. 465 (1919). There this Court said (page 471):

> "Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be (Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149). It may not be resorted to, as the petitioners seek to resort to it here, for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings, even though the cost of them cannot be recovered from the opposing party or even though the order cannot be reversed on error or appeal."

B. The Recommendations of the Judicial Conference Cannot Be Determinative or Even Persuasive on the Question of Whether Certiorari Shall Issue in the Instant Case.

We do not believe that Judge Igoe has acted in any manner contrary to the recommendations of the Judicial Conference but assuming *arguendo* that he had, that would provide no reason for the issuance of a writ of certiorari. As this Court knows, the Judicial Conference is composed of distinguished jurists but its recommendations are advisory only. It cannot, with the force of positive law, prescribe the conditions under which District Judges can or cannot exercise judicial discretion in determining whether to grant or to withhold a stay of proceedings pending before them. In fact the Committee itself has expressly disclaimed such function (13 F. R. D. 62). Eminent as this committee may be, it obviously has no constitutional authority to pre-judge cases or by its pronouncements to set up arbitrary rules for the exercise of judicial discretion.

While the instant litigation is characterized by RCA counsel as the "Big Case", in matter of fact it is only an orthodox treble damage suit brought by Zenith and Rauland against conspirators who have monopolized domestic commerce, cartelized foreign commerce and excluded respondents from foreign markets. The only reason it can be characterized as the "Big Case" is because of the world-wide impact of petitioner's monopoly and the complete control exercised by the conspirators over who can engage in the electronics business throughout the world and under what terms. Nothing in the reports of the Judicial Conference denies to these respondents their constitutional right to prepare and try their lawsuit in Chicago, and no one would be more surprised at the RCA contention than

the eminent judges composing the so-called Judicial Conference.

The statement quoted at page 20 of the petition, from the report of the Attorney General, that "* * * experience has shown that it is of greatest advantage to litigants and the least burden to the judiciary if the cases are assigned for all purposes to a single judge" is lifted out of its context. The Attorney General was merely recommending to the Judicial Conference that the preliminary motions in any given case be heard by the trial judge to whom that particular case had been assigned. There was no recommendation, directly or by inference, that one judge hear two different lawsuits between different parties in two different jurisdictions. This distortion of the Attorney General's statements to the Judicial Conference is typical of the spurious character of the whole RCA contention.

III.

THE ALLEGED CONFLICT OF DECISION BETWEEN DIFFERENT COURTS OF APPEALS DOES NOT EXIST.

The contention made at page 22 of the petition that there is presented a conflict of decision with other Courts of Appeals on the concurrent prosecution of the same controversy in two different District Courts proceeds on the false assumption that the Court of Appeals decided such issue. It also assumes that the Delaware Court in some manner had acquired prior jurisdiction over the treble damage action brought by Zenith and Rauland under the anti-trust laws. All that the Court of Appeals decided was that Judge Igoe did not proceed beyond the limits of sound judicial discretion in refusing to stay respondent's discovery proceedings. As pointed out by Judge Igoe (Appendix, p. 10):

"Until the last amended counterclaim was filed in

> the instant case, there was never asserted by Zenith or Rauland in either case any issue of the right to recover damages for violations of the anti-trust laws. * * * Cross-claimants assert they have been damaged by exclusion from the Canadian radio and television market and that they have been damaged in other specific ways by a conspiracy to dominate and monopolize the radio and television business. It is true that proof of these charges might constitute a defense to the patent infringement charges in the Delaware case, but there are considerable differences between an orthodox anti-trust case and a misuse defense in a patent case. * * * It further appears that Rauland is not a party to the Delaware case and therefore cannot be bound by anything that occurs in that action."

From the above it is clear that the cases cited and discussed at pages 22 through 25 of the petition simply do not fit the factual situation presented by the instant case. No case is cited by RCA showing any conflict with the decision of the Court of Appeals in denying mandamus where the Court below refused to stay its proceeding where it appears that the other case in another jurisdiction presents different issues, different parties, and raises no question of large public interest. In fact, the so-called *Kerotest* case (342 U. S. 180) cited at page 22 of the petition is authority for staying the Delaware case—not the proceedings pending before Judge Igoe in Illinois. In the *Kerotest* case (page 183) this Court affirmed the language of the Court of Appeals as follows:

> "'* * * the whole of the war and all the parties to it are in the Chicago theatre and there only can it be fought to a finish as the litigations are now cast. On the other hand if the battle is waged in the Delaware arena there is a strong probability that the Chicago suit nonetheless would have to be proceeded with for Acme is not and cannot be made a party to the Delaware litigation.'"

As shown by the remarks which RCA quotes at page 11 of the petition, counsel for respondents pointed this out to Judge Leahy in Delaware and took the position before that Court that in so far as the anti-trust issues are concerned, the Chicago forum is the only one in which the issues are broad enough to encompass the entire anti-trust litigation pending between the parties to this case. This, we submit, is not inconsistent with the position that respondents have taken throughout to the effect that the District Court correctly decided it should not stay proceedings in Chicago because of any issue pending in the Delaware Court.

CONCLUSION.

We submit that for the reasons set forth in this answer, a review by certiorari or mandamus of the issues presented in the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

RADIO CORPORATION OF AMERICA,
Petitioner,
vs.
Hon. MICHAEL L. IGOE, United States District Judge for the Northern District of Illinois, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
No. 592

RADIO CORPORATION OF AMERICA,
Plaintiff-Counter-Defendant,
vs.
THE RAULAND CORPORATION and ZENITH RADIO CORPORATION,
Defendants-Counter-Claimants,

ZENITH RADIO CORPORATION and THE RAULAND CORPORATION,
Cross-Claimants,
vs.
RADIO CORPORATION OF AMERICA, GENERAL ELECTRIC COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Cross-Defendants.

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT
Misc. No. 478

BRIEF OF RCA IN REPLY TO BRIEF IN OPPOSITION

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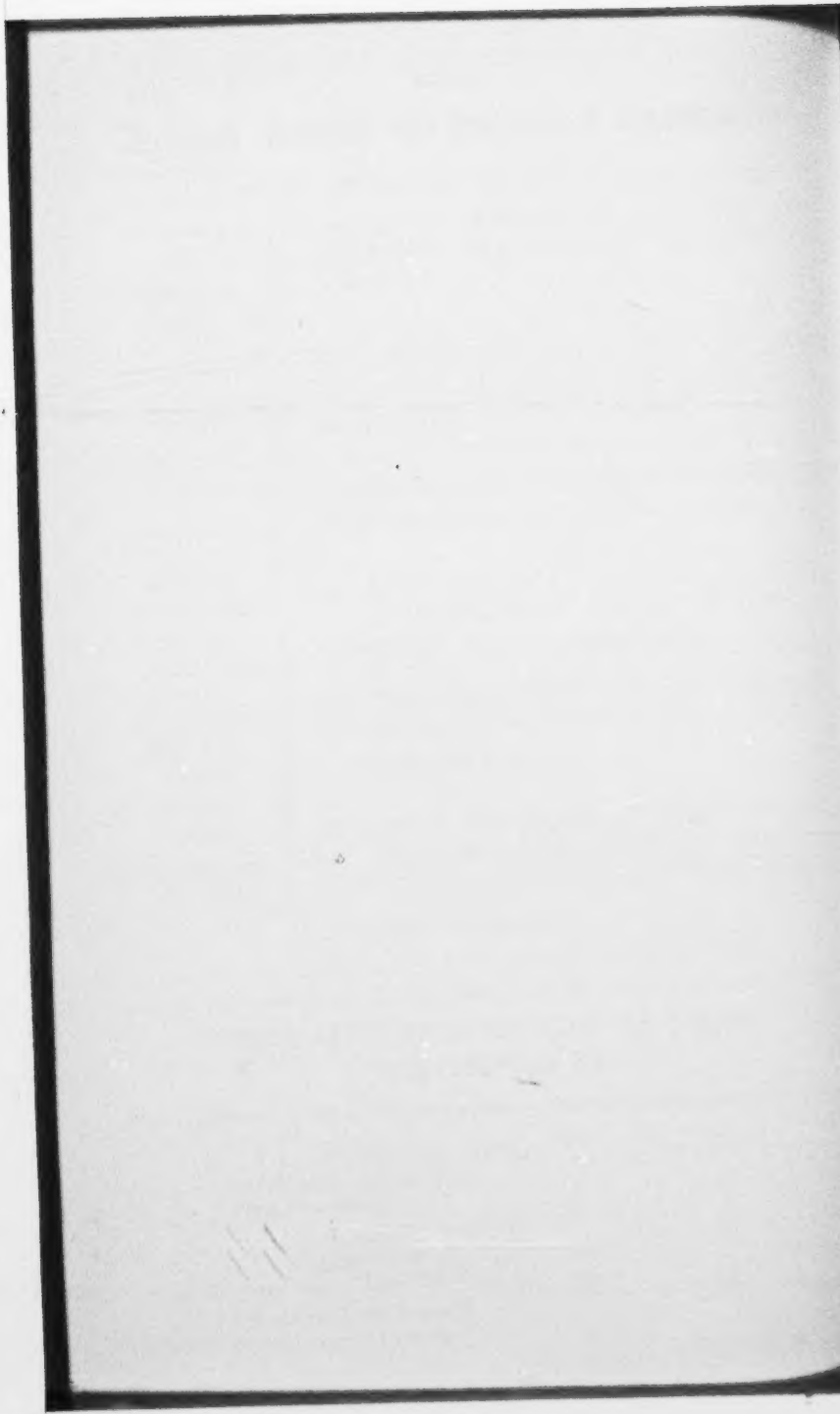
March 17, 1955



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The Zenith brief in opposition consists largely of accusations that the RCA petition is not a "fair statement" of the case, consists of "utterly false assertions", "distortion", contentions of "spurious character", and represents nothing more than "delaying and harassing tactics".

But invective is no substitute for analysis—nor is epithet a substitute for argument.

The Zenith brief in no way meets the points raised in the RCA petition, other than by reliance on the decision below, the very decision before this Court for review. But this amounts to nothing more than insisting that "we're right because the lower court said so". If such circular reasoning were carried to its logical conclusion this Court would never have anything to review.

Refining the intemperance and irrelevance out of Zenith's brief, there seems to be left:

I. a denial that RCA is entitled to review by certiorari or otherwise because there is no conflict between the litigations in Delaware and Illinois; and

II. an accusation that the sole purpose of the RCA petition is delay; and

III. an assertion that the recommendations of the Judicial Conference are inconsequential.

I.

Zenith's charge that the cases are different and that there is no conflict between them is contradicted by the record.

The RCA petition rests upon the premise that the Illinois District Court has assumed to deal with matters previously placed before, and dealt with by, the Delaware District Court.

The whole response of the Zenith brief in opposition depends, as it must, entirely upon the opposite premise, namely, that the controversy in the two District Courts is so different that no conflict can exist.

All the principles of comity and all the recommendations of the Report of the Judicial Conference are brushed aside as having nothing to do with *"two different lawsuits between different parties in two different jurisdictions."** (p. 16)

The brief in opposition ignores the fact that it is not RCA alone who asserts the identity of the issues in the two actions. Not only is this plainly established by the pleadings themselves (Petitioner's Exhibit E), but this has also been recognized at least four times by Judge Igoe, and as often plainly stated by Zenith.

In answer to the charge of "utterly false assertions", it would be well to look at the record.

(a) The Record as to Judge Igoe.

April 9, 1953. Zenith oral motion to amend its pleadings:

> *Judge Igoe:* "I don't think it was ever intended two law suits involving the same issues should be tried in two different Federal Districts of our country at the same time.
>
> • • • • • •
>
> "As far as I am concerned, this case is not going to be tried until the case in Delaware is terminated. I don't think that would be fair to Judge Leahy, and it wouldn't be fair to the present court." (Petitioner's Supplemental Exhibit H, p. 6)

April 29, 1953. RCA motion to hold filing of amended counterclaim in abeyance:

> *Judge Igoe:* "They [Zenith and Rauland] can't get this case to issue with the case going on in Delaware. They are not going to have two trials at the same time. That is certain." (Petitioner's Supplemental Exhibit H, p. 142)

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* Emphasis ours throughout.

June 26, 1953. Zenith motion to proceed with pre-trial depositions on its amended counterclaim:

> *Judge Igoe:* "Well, as I see this situation, you have two law suits here, one in Delaware and one in Illinois, and insofar as I can understand it, they are both identical; the same issues are raised and the same parties are involved, except up here you do not have all of the parties you have down in Delaware.
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> • • • • • •
>
> "In this case in Delaware Judge Leahy has gone into this matter very thoroughly and he has indicated he wants to try it and has set forth his schedule.
>
> • • • • • •
>
> "And very frankly, without saying any more about it, I believe I agree with Judge Leahy and I am not going to do anything that will interfere with the orderly manner in which he thinks this litigation should be tried." (Petitioner's Supplemental Exhibit H, pp. 182-183)

February 11, 1954. Zenith motion to add claim for treble-damage relief:

> *Judge Igoe:* "• • • We will not have any action in this branch of the law suit in Chicago until the Delaware litigation has concluded. That was the agreement that was reached before you arrived here, Mr. McConnell, and we are going to keep it. But that does not mean an amended counter claim may not be filed. • • •
>
> • • • • • •
>
> "But I thought it was understood and I know that is the way I understood it, and that is the way it is going to be, the Delaware branch of this litigation shall be concluded before this branch starts to move." (Petitioner's Supplemental Exhibit I, p. 264; Appendix to Petition, pp. 6-7)

Thus, the record is clear that from the beginning up to and through the filing of the counterclaim for treble damages—the addition of a dollar sign to the old antitrust allegations—it was Judge Igoe himself who recognized and ruled that the antitrust issues were the same, and that the Illinois action should be stayed in order to avoid interference with the Delaware action.

In fact, even in his opinion reversing the stay, Judge Igoe was unable to deny the continued inherent identity of the two actions, acknowledging that it is "true that proof of these charges [the antitrust allegations supporting the treble-damage claim] might constitute a defense to the patent infringement charges in the Delaware case, but there are considerable differences between an orthodox anti-trust case and a misuse defense in a patent case." (Appendix to Petition, pp. 10-11)

Actually, the truth of the matter is that the misuse defense to which Judge Igoe here refers has been held by this Court to be far broader than a private antitrust cause of action for the reason, among others, that the misuse defense does not depend upon specific injury to the complainant, whereas the private antitrust cause of action does. *Morton Salt Co.* v. *G. S. Suppiger,* 314 U. S. 488 (1942); *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495 (1942).

(b) The Record as to Zenith and Rauland.

Here, again, the record could not be more clear. Zenith and Rauland themselves have repeatedly not only admitted, but asserted, the continued identity of the substantive allegations supporting all their antitrust claims, whether denominated a misuse defense, a cause of action for injunction, or a claim for treble damages.

In seeking to obtain leave to add the very claim for relief now relied upon as establishing that the controversy in

Illinois is different from that in Delaware, Zenith and Rauland represented to the Illinois court in February of 1954:

> "Strictly speaking, the present motion is not a pleading of an omitted counterclaim but is a proposed amendment of a counterclaim already on file so that treble damage relief can be procured under allegations which have in substance already been pleaded as a basis for injunctive relief." (Petitioner's Supplemental Exhibit I, p. 219)

Various other statements illustrative of Zenith's representations as to this continued identity may be found at pages 7, 8, 9, 14, 15, and 16 of the RCA petition.

These are not idle representations; they are representations upon which the Illinois District Court has been induced to act, particularly in allowing the successive amendments to the counterclaim in the Illinois action.*

Finally, the clear identity of the antitrust issues in the two actions, and their inextricable relationship, is again betrayed by Zenith's most recent maneuver in the Delaware action. If duplication and conflict between the two litigations were not involved, as Zenith would have this Court

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* Nor can counsel for Zenith avoid the effect of statements of this character, as he attempted with respect to another important representation on another matter:

> "Well, I don't know. I make some statements in the course of cases that I wish I had never made and that is one of them. And I have made some others. Sometimes when you are trying lawsuits and you are dealing with some other issue, and something comes up and you make statements which, after you have had a chance to sit down and think through, you wouldn't have made, and that is one of them." (Transcript, January 28, 1955, before Judge Igoe, p. 72)

This is a strange statement for responsible counsel, and playing fast and loose with available federal procedures is precisely the reason why the Judicial Conference recommends that cases of this character be handled from the very beginning by a single judge.

believe, would Zenith now be saying to Judge Leahy with reference to the antitrust issues:

> *"I am certainly sure this Court is not going to feel badly about being relieved of that lengthy litigation. * * * Another court has assumed to carry it."* (Transcript, January 4, 1955, p. 16)

But present counsel for Zenith is bolder still. Not content with attempting to overrule Judge Leahy's "blueprint" and lift the whole antitrust issue out of the court of first jurisdiction in Delaware, counsel is now even urging that the trial of the *patents* in Delaware be stayed pending disposition of the Illinois case!

In short, in Zenith's view, the antitrust issues are so identical in both forums—Illinois and Delaware—as to require one court to defer to the other. Yet Zenith blandly represents to this Court that there can be no conflict between the two actions!

II.

Zenith's charge that the sole purpose of RCA's petition for certiorari is delay is squarely contradicted by the record.

Zenith instituted this controversy—in 1946—in Delaware by attacking the patents licensed by RCA and everything else RCA has ever done from Poland to Tahiti.*

* The scope of the antitrust controversy, as set forth in the interrogatories originally filed by Zenith in both actions, is described by Judge Leahy as calling for information relating to RCA ranging from the United States to Poland, Argentina, Chile, Brazil, Belgium, China, Czechoslovakia, The Dutch West Indies, The States of the Levant Under French Mandate, Italy, Indo-China, Japan, Liberia, The Netherlands, The Dutch East Indies, Portugal, Surinam, Siam, Spain, Sweden, Costa Rica, Turkey, Russia, Venezuela, Australia, Germany, France, Bolivia, Canada, Cuba, Switzerland, Territory of Hawaii, The Fiji Islands and Tahiti (Petitioner's Exhibit A, p. 5).

Yet over eight years later, after all the pre-trial discovery and other proceedings and after repeated efforts by RCA to bring the case to trial, the issues tendered to the Delaware court by Zenith have still not been tried. And now, asking the Delaware court for further delay, counsel for Zenith had this to say in January about RCA's request that the case be set for prompt trial:

> "* * * I believe that an *early* [sic!] trial here is sought for only one reason, and that is to embarrass us or to make it more difficult for us to proceed in the other suit on our anti-trust issue." (Transcript, January 4, 1955, pp. 15-16)

Yet Zenith has the temerity to charge RCA with "delaying and harassing tactics" because it is trying to proceed with the case in the court which first had "possession of the subject", to use Justice Marshall's words,* and which has painstakingly worked out an orderly plan of procedure.

Actually, the whole purpose of the RCA petition is to avoid further delay in the trial of *all* the issues in Zenith's own Delaware action, as well as to keep the antitrust issues within a compass that will not require perpetuity to prepare and try.

Zenith's brief grossly asserts that the real purpose of RCA's petition is to conceal "a vicious world-wide restraint of trade". (p. 11) Aside from the fact that this alleged "vicious restraint" is pursuant to consent decrees of a United States District Court, Judge Leahy has squarely held that there is "no attempt" on the part of RCA to prevent appropriate discovery as to any issue whatever. (Petitioner's Exhibit A, p. 32) Actually it is *Zenith* who has consistently refused to proceed with antitrust discovery pursuant to Judge Leahy's blueprint, and is now

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* *Smith* v. *McIver*, 9 Wheat. 532, 535 (U. S. 1824).

attempting to delay even the patent case in Delaware while the Illinois case proceeds. Already discovery in that action is proceeding or is sought, both here and abroad, without any chart, a motion for a pre-trial conference on the scope of discovery having been summarily ignored, and in direct conflict with Judge Leahy's blueprint. The consequence can only be disorder and more litigation and more delay.*

As for Zenith's bald assertion that "Judge Leahy does not believe that anything occurring in Illinois threatens to deprive him of jurisdiction over the issues he has assumed to try" (p. 9), we concede that *we* do not know precisely what Judge Leahy *believes*, but we *do* know that he has assumed to try *all* the issues, including the antitrust issues. And we know further that nothing he has said or done sustains Zenith's confident conclusion about Judge Leahy's state of mind.

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* A petition for certiorari, the granting of which is squarely supported by this Court's opinions, can scarcely be described as without substance, and solely for delay.

This Court granted certiorari in the *Kerotest* case to review the Third Circuit's reversal of its district court which started to proceed with the second-brought of two litigations. This Court affirmed the Third Circuit's reversal.

Zenith does not attempt to deny the statements in the RCA petition as to the conflict here involved between the circuits on questions of comity and mandamus, as well as the misapplication of this Court's decision in the *Bankers Life* case (Petition, pp. 22-25), except by asserting that these are "different" cases. Here again the assertion is supported only by the circular staircase—because the court below says so. The claim that the "trial court's" lifting of the stay is supported by "findings of fact" (brief in opposition, p. 6) is entirely without foundation. Neither court below made any findings of fact whatever.

Finally, review here involves no more investigation of the record than was involved in the *Kerotest* or the *Bankers Life* cases. The identity of the antitrust issues is apparent on the face of the pleadings, which show that there is no difference between Illinois and Delaware except the treble-damage claim—a dollar sign added to the prior antitrust allegations seeking injunctive relief.

Indeed, two days after Zenith filed its motion to further delay the Delaware case, Judge Leahy asked counsel to inform him whether a petition for certiorari would be filed in this Court looking to reinstating the stay of the Illinois litigation. (Memorandum of Judge Leahy to Mr. Pollard, Clerk, February 3, 1955)

Counsel for RCA thereupon advised Judge Leahy with respect to the filing of the petition and submitted a copy of the petition to him. Were speculation about Judge Leahy's state of mind appropriate, it would appear that he is also looking to this Court for the resolution of the conflict between the two litigations.

III.

Zenith dismisses the recommendations of the Judicial Conference as inconsequential.

The brief in opposition asserts that this is "only an orthodox treble damage suit", whatever that may be, as if the whole thing began in 1954. This myopic view shuts out all that has developed in this welter of litigation since 1946.

This case, pending for many years in two federal courts, involving intricate issues of great importance to the parties and public alike and already numbering thousands of pages of record even before trial, was described by Judge Leahy as a litigation of "complexity and magnitude." Certainly it is precisely the kind of case which demands, in the interest of orderly, efficient justice, application of the constructive recommendations of the Judicial Conference.

Counsel for Zenith brushes aside these thoughtful recommendations made in the public interest by a committee of

our ablest judges, including Judge Leahy, as "the *so-called* Judicial Conference." (p. 16) But distasteful as the application to this case of the recommendations may be to Zenith, it should not be permitted to shop around with successive versions of the same controversy in order to obtain a more agreeable result.

The federal judicial system cannot function if a litigant can scurry from one District Court to another to argue incessantly the same points over and over again.

Unless the present situation in Illinois is reviewed and reversed by this Court, any litigant dissatisfied with the rulings of the first court—even a court of its own choosing—could change the form of its pleadings, add as an additional party a subsidiary or anybody else it could persuade to go along, and thereby not only evade the decision in the first action but multiply litigation and inflate the cost and deflate the efficiency of the federal judicial system.

The public interest in minimizing competing, conflicting and duplicative litigation far transcends this case, these facts and parties. Too many litigants are finding it difficult to get one trial without burdening the federal judicial system with two long sprawling proceedings in the same controversy. Moreover, the devious method of reversing judicial decision and dividing judicial responsibility which has been followed here may well be invoked by other dissatisfied litigants. Imperiling continuity and order in federal litigation as it does, it is hardly one to be encouraged.

The issues in this case and the unresolved conflicts it presents all fall precisely within the standards of Rule 19 of this Court. Moreover, this ponderous and complex case is an invitation to this Court to exercise its responsibility

for supervising the federal judicial system by advancing the conclusions of the Judicial Conference.

Respectfully submitted,

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